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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 96

THE UNITED STATES OF AMERICA, PETITIONER

vs.

GREAT NORTHERN RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 21, 1932

CERTIORARI GRANTED MAY 31, 1932

31 128910

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1

United States District Court,
District of Minnesota,
Third Division.

The United States of America,
Plaintiff,
vs.
Great Northern Railway Company,
Defendant.
No. 2246, Law.

Pleas before the Honorable, the Judges of the United States District Court for the District of Minnesota.

Be It Remembered, that on the 29th day of September, 1930, a Complaint was filed in said Court in the above-entitled action, in the words and figures following, to-wit:

2

Complaint

In the District Court of the United States
For the District of Minnesota

United States of America,
Plaintiff,
v.
Great Northern Railway Company,
Defendant.
At Law No. 2246

United States of America, plaintiff, by its Attorney for the District of Minnesota, now comes and sues the Great Northern Railway Company, defendant, for the sum of $1,329,-785.98, with lawful interest thereon as hereinafter prayed, and, for its cause of action, complains and alleges:

1. That the defendant is, and at all times herein mentioned was, a corporation duly incorporated under the laws of the State of Minnesota, and a carrier by railroad subject to the Interstate Commerce Act, owning and, except during the period of Federal Control hereinafter referred to, operating a railroad and system of transportation in the States of

Minnesota, Wisconsin, Iowa, North Dakota, South Dakota, Montana, Idaho, Washington and Oregon, and also owning the stock of certain subsidiary railway corporations which own railroads in the United States and of certain other subsidiary railway corporations which own railroads in Canada;

2. That on December 31, 1917 the President of the United States took possession of said railroad owned by defendant and of the railroads in the United States owned by defendant's subsidiary corporations, under the provisions of the United States Federal Possession and Control Act of
3 August 29, 1916 (39 Stat. L. 645), and continued to operate said railroads under said Act and under the Federal Control Act of March 21, 1918 (40 Stat. L. 451) until March 1, 1920;

3. That on December 30, 1918, W. G. McAdoo, Director General of Railroads for the United States, entered into a contract with defendant and its subsidiary companies owning railways in the United States fixing the annual compensation to be paid to defendant and said subsidiary companies under Section 1 of the Federal Control Act;

4. That Section 209 of the Transportation Act of 1920, (41 Stat. L. 464) provided a guaranty by the United States to any carrier with which such a contract fixing the amount of compensation under the Federal Control Act had been made, which guaranty provided that the railway operating income of such carrier for the six months period beginning March 1, 1920 should not be less than one-half the amount named in such contract as annual compensation, and paragraph (b) of said Section 209 provided that said Section 209 would be applicable only to such carriers as filed with the Commission, on or before March 15, 1920, a written statement accepting all the provisions of said Section 209;

5. That prior to March 15, 1920 the defendant and its subsidiary companies owning railways in the United States filed with the Interstate Commerce Commission (hereinafter called the "Commission") a written statement that they accepted all the provisions of Section 209 of the Transportation Act of 1920, and the guaranty thus became applicable to defendant;

6. That during and following the six months period beginning March 1, 1920 the Commission, pursuant to the provisions of paragraph (h) of Section 209 of the Transportation Act of 1920. upon application of defendant, issued certificates to the Secretary of the Treasury to the effect that certain

advances should be made to defendant under paragraph (h) of said Section 209, the Commission basing the amount of the advances so certified upon an examination of statements submitted by defendant and other data available to the Commission at the time said certificates were issued, the number, date, and amount of said certificates being as follows:

Number of Certificate	Date of Certificate and Date Therein Specified for Payment	Amount
A- 65	June 25, 1920	$3,000,000.
A-225	August 31, 1920	2,000,000.
A-276	November 4, 1920	1,500,000.
		$6,500,000.

(Certificates A-65, A-225 and A-276 are reproduced and made a part hereof in Appendices "A", "B" and "C" hereto annexed);

7. That thereafter and on March 1, 1921, in accordance with paragraph (g) of Section 209 of the Transportation Act of 1920, as amended on February 26, 1921 by Section 212 of said Act (41 Stat. L. 1145), the Commission issued to the Secretary of the Treasury its certificate, No. A-329 (a copy of this certificate, marked "Appendix D", is hereto annexed and made a part hereof), to the effect that an additional $6,000,000 was necessary to make good the guaranty to defendant provided by said Section 209, the amount so certified being based upon statements under oath submitted by defendant on form of claim sent by the Commission to defendant, and upon other data available to the Commission at that time;

8. That pursuant to certificates No. A-65, A-225, A-276 and A-329, and shortly after the issuance of each, the Secretary of the Treasury transmitted to defendant the several amounts indicated by each such certificate, thereby transmitting to defendant a total amount of $12,500,000;

9. That before receiving any of the amounts heretofore mentioned, defendant executed a contract with the Secretary of the Treasury of the United States, as required by paragraph (h) of Section 209 of the Transportation Act of 1920, to the effect that upon final determination of the amount of the guaranty provided for by said Section 209 defendant would repay to the United States any amounts

received by it from advances under Paragraph (h) of said Section 209 in excess of the amount of said guaranty, with interest at the rate of six per cent per annum from the time such excess was advanced;

10. That under date of June 17, 1925 the Commission acting under authority of Paragraph (g) of Section 209 of the Transportation Act of 1920, issued its certificate, No. A-1041, (a copy of this certificate, marked "Appendix E", is hereto annexed and made a part hereof) addressed to the Secretary of the Treasury, which set forth that $11,198,887.31 was the amount necessary to make good to defendant the guaranty provided by said Section 209, and under date of June 22, 1925 the Treasury Department addressed to the Comptroller of defendant a letter (copy of this letter, marked "Appendix F", is hereto annexed and made a part hereof) demanding that defendant refund to the Treasury $1,321,112.69, which amount represented the difference between the total amount transmitted to defendant pursuant to Certificates No. A-65, A-225, A-276 and A-329 and the amount due defendant as certified by the Commission in Certificate No. A-1041, dated June 17, 1925;

11. That defendant refused to refund to the Treasury the amount so demanded, and that a rehearing, upon application of defendant, was had before the Commission, which, on June 8, 1926, issued its amended certificate, No. A-1041, (a copy of this certificate, marked "Appendix G", is hereto annexed and made a part hereof), canceling the certificate bearing the same number dated June 17, 1925, which amended certificate certified that $11,170,214.02 was the amount necessary to make good to defendant the guaranty provided by Section 209 of the Transportation Act of 1920, and said amended certificate was delivered to the Secretary of the Treasury, and the Treasury Department under date of
6 July 8, 1926, addressed to the Comptroller of defendant a letter (a copy of this letter, marked "Appendix H", is hereto annexed and made a part hereof) demanding that defendant refund to the Treasury $1,329,785.98, which amount represented the difference between the total amount transmitted to and received by defendant pursuant to Certificates No. A-65, A-225, A-276 and A-329 and the amount due defendant as shown by said amended certificate No. A-1041, dated June 8, 1926, and that defendant refused to refund the amount so demanded in said letter;

12. That the sum of $1,329,785.98 is due to plaintiff and payment of said sum, or any part thereof, has been and still is wholly refused by defendant.

Wherefore plaintiff prays judgment against defendant for the sum of $1,329,785.98, together with lawful interest thereon from and after March 2, 1921 (the date the overpayment was made), and for the costs of this action.

LEWIS L. DRILL
United States Attorney for the
District of Minnesota.

WILLIAM D. MITCHELL,
Attorney General.

JOHN LORD O'BRIAN,
Assistant to the Attorney General.

ELMER B. COLLINS,
WENDELL BERGE,
Special Assistants to the Attorney General.

(Note: The appendices to the foregoing complaint are omitted in printing at this point, but are printed as appendices A to H2, inclusive, to the Amended Complaint which is printed herein).

7 District of Columbia, ss:

Elmer B. Collins, being duly sworn, says that he is a Special Assistant to the Attorney General of the United States, that he has read the foregoing complaint and knows the contents thereof, and that he is informed and verily believes the allegations therein to be true.

ELMER B. COLLINS

Subscribed and sworn to before me this 19th day of September, 1930.
(Seal)

W. MARVIN SMITH

8 State of Minnesota }
County of } ss.

Lewis L. Drill, being duly sworn, says that he is the United States Attorney for the District of Minnesota; and that he is authorized to sign the above complaint on behalf of the United States by the Attorney General of the United States, and that, upon his information and belief, the allegations of said complaint are true.

LEWIS L. DRILL

Subscribed and sworn to before me this 22 day of September, 1930.

GEORGE A. HEISEY
(Seal) Notary Public, Ramsey Co. Minn

My commission expires 3-18-32

Indorsed: Complaint Filed Sep 29 1930 Joel M. Dickey, Clerk.

---

9 (Demurrer of Defendant to Complaint.)

Now comes the defendant and demurs to the complaint herein, and to the whole thereof, on the ground that the facts stated in said complaint do not constitute a cause of action.

F. G. DORETY
R. J. HAGMAN
J. H. MULALLY
1120 Great Northern Building,
Saint Paul, Minnesota.

MILLAN & SMITH
Fendall Building,
Washington, D. C.
Attorneys for Defendant.

Due and personal service of the within Demurrer is hereby admitted this 13 day of October 1930.

LEWIS L. DRILL,
Attorney for plaintiff.

Indorsed: Filed Oct. 13, 1930. Joel M. Dickey, Clerk.

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10 (Order sustaining Demurrer to Complaint.)

This cause came on to be heard on the 3rd day of November, 1930, upon a demurrer of the defendant to the plaintiff's complaint.

Mr. F. G. Dorety, Mr. R. J. Hagman, and Mr. J. H. Mulally, of St. Paul, Minnesota, (Mr. R. E. L. Smith, of Washington, D. C., was with Mr. Doherty on the brief) appeared for the defendant;

and

Mr. Elmer B. Collins, Special Assistant to the Attorney General, of Washington, D. C., Mr. Lewis L. Drill, United States Attorney, and Mr. George A. Heisey, Assistant United States Attorney, of St. Paul, Minnesota, (Mr. John Lord O'Brian, Assistant to the Attorney General, of Washington, D. C., was with them on the brief) appeared for the plaintiff.

11 The facts admitted by the demurrer are, in substance, these:

The defendant was a carrier entitled to the guaranty provided for by Section 209 of the Transportation Act of 1920 (41 Stat. L. 464). It received as advances during the guaranty period, March 1, 1920, to September 1, 1920, $6,500,000, under Section 209 (h). On March 1, 1921, or shortly thereafter, it received $6,000,000 additional under Section 209, as amended by Section 212 (Section 212 having been enacted February 26, 1921; 41 Stat. L. 1145). On June 17, 1925, the Interstate Commerce Commission issued a final certificate determining that the defendant was entitled to $11,198,887.31 in satisfaction of the guaranty, and thereafter and on June 8, 1926, issued an amended final certificate, pending a rehearing, fixing the amount at $11,170,214.02. The plaintiff demanded that the defendant refund the difference between what it had received and the amount finally fixed by the Commission. The defendant refused to make the refund, and this suit resulted. It should be noted that the plaintiff does not allege that the payment of $6,000,000 made in 1921, after the enactment of Section 212, was the result of fraud, accident or mistake, but bases its right to recover solely on the proposition that the final determination of the amount necessary to make good the guaranty establishes its right

to recover the difference between what was paid to the defendant and the amount finally determined by the Commission to be the amount which the defendant was entitled to.

12 The question presented is this: Under Section 209, as amended by Section 212, was a carrier entitled to the guaranty provided for required to refund to the government any portion of payments made to it under the provisions of Section 212 in the event that the Commission thereafter determined that such payment, plus advances made under Section 209 (h), was in excess of the amount guaranteed?

Section 209, as originally enacted, seems readily understandable. It guarantees to a carrier accepting its provisions, "that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one-half the amount named in such contract (the contract fixing just compensation under the Federal Control Act) as annual compensation".

Paragraph (g) provides:

"The Commission shall, as soon as practicable after the expiration of the guaranty period, ascertain and certify to the Secretary of the Treasury the several amounts necessary to make good the foregoing guaranty to each carrier. * * *"

Paragraph (h) provides:

"Upon application of any carrier to the Commission, asking that during the guaranty period there may be advanced to it from time to time such sums, not in excess of the estimated amount necessary to make good the guaranty, as are necessary to enable it to meet its fixed charges and operating expenses, the Commission may certify to the Secretary of the Treasury the amount of, and times at which, such advances, if any, shall be made. The Secretary of the Treasury, on receipt of such certificate, is authorized and directed to make the advances in the amounts and at the times specified in the certificate; upon the execution by the carrier of a contract, secured in such manner as the Secretary may determine, that upon final determination of the amount of the guaranty provided for by this section such carrier will
13 repay to the United States any amounts which it has received from such advances in excess of the guaranty, with interest at the rate of 6 per centum per annum from the time such excess was paid."

Section 209, as originally enacted, provided for the ascertainment by the Commission of the amount due each carrier after the guaranty period had expired, and provided for advances of estimated amounts during the guaranty period upon condition that if the estimates proved incorrect, the excess should be refunded. As it was construed, it did not permit any advances to be made to the carrier after the guaranty period had expired, nor did it permit partial payments of amounts known to be due, prior to the final ascertainment of the "several amounts necessary to make good the foregoing guaranty".

An examination of the Congressional debates upon the bill which finally became Section 212 clearly shows the situation with which Congress was confronted at the time of the enactment of that section, the reasons for enacting it, and the effect that it was intended to have. (See Congressional Record, Volume 60, pages 2736 to 2740, and pages 2799 to 2819.)

The amounts known to be due the carriers, under Section 209, at the time Section 212 was being considered, were vastly in excess of the advances which the carriers had received under Section 209 (h). The carriers were in need of the money which had been promised them. The Interstate Commerce Commission could not issue certificates in advance of final determination, nor could the carriers receive any money in advance of the final determination of the
14 entire amount necessary to make good the guaranty, and the carriers were precluded by the terms of Section 209 (h) from applying for further advances. Thus, although the government owed the carriers more than $300,000,000 and knew that it owed them that amount, it could not pay what it owed until such time as the Commission was able to make a final determination of the exact amount due each carrier, which involved not only a consideration of ascertained debits and credits, but a consideration of deferred debits and credits.

It appears clearly that Section 212 was an amendment of paragraph (g) of Section 209, and had no reference whatever to paragraph (h) of that Section. Section 212 reads in part as follows:

"In making certifications under * * * section 209, the Commission, if not at the time able finally to determine the whole amount due under such section to a carrier * * * may make its certificate for any amount definitely ascertained by it to be due, and may thereafter in the same man-

ner make further certificates, until the whole amount due has been certified. * * *"

"(b) In ascertaining the several amounts payable under * * * " section 209, "the Commission is authorized, in the case of deferred debits and credits which can not at the time be definitely determined, to make, whenever, in its judgment practicable, a reasonable estimate of the net effect of any such items, and, when agreed to by the carrier or express company, to use such estimate as a definitely ascertained amount in certifying amounts payable under * * *" section 209, "and such estimates so agreed to shall be prima facie but not conclusive evidence of their correctness in amount in final settlement."

The proponents of the bill which became Section 212 clearly and definitely explained that it was the intention that the Interstate Commerce Commission should have the power to issue certificates to the carriers for amounts definitely ascertained to be due them, and that payments made under such certificates should be final.

As the bill was originally drawn, under paragraph (b) the reasonable estimate of the net effect of deferred debits and credits was also to be binding, but the bill was finally amended so that such estimates should only be prima facie evidence of their correctness. This was done upon the theory that an estimate was in the nature of a guess and that the United States should not be bound by a mere estimate. An amendment was offered to Section 212 (a), which would have required a carrier, upon the final determination by the Commission of the amount necessary to make good the guaranty, to refund any amounts received by it under that paragraph in excess of the amount finally determined to be due. That amendment was voted down upon the proposition that the Interstate Commerce Commission could be trusted to protect the interests of the government and not to pay to the carriers any amount in excess of that which was actually owing. The construction given to the section prior to its enactment by Congress is well expressed in the letter written by the Chairman of the Interstate Commerce Commission to Congressman Esch on the 22nd day of January, 1921, which reads as follows:

"Washington, January 22, 1921.

Hon. John J. Esch,
Chairman Committee on Interstate and Foreign
Commerce, House of Representatives.

Dear Sir:

This morning Representative Sims, member of your committee, called and discussed with me some features of H. R. 15713, more particularly paragraph (b) of Section 212.

16 Mr. Sims thought that there was difference of understanding as to the intent of the language in this paragraph, and he asked that I write you my conception of the manner in which, if enacted in its present form, it would be interpreted and applied by the Commission.

Paragraph (a) of Section 212 very definitely authorizes certificates in partial payment and payment of such certificates. It will be noted that such certificates are by the terms of this paragraph to be 'for any amount definitely ascertained by it (the Commission) to be due.' I think there is no misunderstanding in that language. There is no room for misunderstanding of our conception of our duties under it, which is that a partial payment certificate would not be made for any amount in excess of any amount 'definitely ascertained' by us to be due the carrier.

Paragraph (b) provides that as to deferred debits and credits which cannot at the time be definitely determined the Commission may when it is deemed practicable make a reasonable estimate of the net effect of such deferred debits and credits and when agreed to by the carrier or express company to use such estimate as a definitely ascertained amount in certifying sums payable and provides that such estimate so agreed to shall be binding in final settlement.

Judge Sims thinks that this language is susceptible of interpretation which would authorize the Commission to make estimates of deferred debit and credit items in connection with partial payments, leaving other deferred debit and credit items for consideration in connection with other or further certificates or final settlement. I think that the language is susceptible of that interpretation, but I do not understand that the Commission has any thought of so using it, and I do not conceive that the Commission would so use it. The authority is permissive. The paragraph contemplates making a reasonable estimate of the net effect of such deferred debit and credit items and using them under agreement with the carriers as a basis for a final settlement. Under that permissive authority the Commission would be

under the moral obligation to preserve to all reasonable extent the interests and welfare of the Government, and it would be its purpose so to do. The amount of money involved in the deferred debit and credit items is not a large item as compared with the amount of the guaranty. The pur-
17 pose of this paragraph, as I understand it, is to make possible speedy and final settlements under terms fair to the carrier and fair to the Government, and to make final settlement under such an agreement rather than to have some of these claims drag along for many months or years waiting the final determination of the debit and credit items, which final determination might in small measure affect the balance.

Yours very truly,

EDGAR E. CLARK,
Chairman Interstate Commerce Commission."

The whole scheme of Section 212 was to get into the hands of the carriers the money to which they were entitled under Section 209 as rapidly as amounts due became capable of definite ascertainment by the Commission, instead of requiring that it be withheld until such time as the Commission was able to finally determine the total amount of the guaranty. It was contemplated and expected that the Commission should not certify any amount which was not actually due. The certificates for partial payments under Section 212 were intended to have the same force and effect with respect to amounts determined to be due as the certificates for final payment provided for in Section 209 (g).

Since in this case the $6,000,000 was paid to the defendant after the enactment of Section 212, upon the certificate of the Commission that that amount was due to the defendant in addition to the advances which it already had received, I cannot find any basis for holding that the final certificate, showing a less amount than the defendant actually received, gives to the government a cause of action for the recovery of the difference in the amounts certified.

18 I realize that my views as to the proper construction of Section 209 as amended by Section 212 do not coincide with those of the Court of Appeals of the District of Columbia as expressed in Northern Pacific Railway Co. v. Interstate Commerce Commission, 23 Fed. (2d) 221. However, the situation presented in that case was different than this. There the Northern Pacific Railway Company had asked for the partial payment on account under Section 212, representing that the government would be protected in

making payments by virtue of securities deposited by that carrier for the repayment of advances.

It is the contention of the government that Section 212, because it did not repeal Section 209 (g) or Section 209 (h), must be taken as showing an intention on the part of Congress that the certificates issued for amounts definitely ascertained to be due are not of the same force as the final certificate provided for in Section 209 (g). I cannot believe that such a construction is justified in view of the clearly expressed intent of Congress as shown by the Congressional Record, and, for that matter, by the language employed in the Act, that the amounts paid under section 212 should be those "definitely ascertained by it (the Commission) to be due" and therefore not recoverable even though in excess of the amount finally ascertained. Section 212 did not repeal Section 209 (g), but, after the enactment of Section 212, the only purpose of the final determination provided for by Section 209 (g) was to ascertain how much more the carrier was entitled to than had been certified and paid under Section 212.

I have not set forth those portions of the debates which have constrained me to reach the conclusions which I
19 have expressed. Many of them are set out in the brief of the defendant, and many others will be found in the pages of the Congressional Record referred to herein.

If this action were based upon fraud, accident or mistake in the issuance of the certificates for $6,000,000, or if it were the claim of the government that an error had been made in calculating deferred debits and credits under paragraph (b) of Section 212, I should overrule the demurrer. If, however, I am correct in my construction of the purpose and effect of Section 212 and the force which it was intended that the certificates issued under paragraph (a) of that section should have, the defendant is entitled to have its demurrer sustained. It is ordered that it be and is sustained.

The plaintiff may have twenty days in which to file an amended complaint, if it be so advised.

Dated this 7 day of February, 1931.

JOHN B. SANBORN
U. S. District Judge.

Indorsed: Order sustaining demurrer filed February 7, 1931. Joel M. Dickey, Clerk. By Margaret L. Mullane, Deputy.

20 (Order as to time to file Amended Complaint.)

Whereas in the above entitled cause the attorneys of record for plaintiff have represented to the court that pressure of other business has prevented them from definitely determining their course of action in said cause, and the court being assured that counsel of record for the above-named defendant waives notice of application for this order and is agreeable to the making of this order

Now, Therefore it is ordered that the time within which plaintiff may file its amended complaint in said cause be and the same hereby is extended to and including March 19th, A. D. 1931.

By the Court.

JOHN B. SANBORN
Judge

Dated at St. Paul, Minn., this 26 day of February, 1931.

Indorsed: Order filed February 26, 1931. Joel M. Dickey, Clerk. By Margaret L. Mullane, Deputy.

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21 Amended Complaint.

In the District Court of the United States
For the District of Minnesota

United States of America, Plaintiff, v. Great Northern Railway Company, Defendant.	At Law No. 2246

United States of America, plaintiff, by its Attorney for the District of Minnesota, now comes and, pursuant to leave of Court heretofore granted, brings this amended complaint against Great Northern Railway Company, defendant, to recover the sum of $1,329,785.98, with lawful interest thereon as hereinafter prayed, had and received by defendant to the use of the plaintiff and paid to defendant by the plaintiff in and through mistake and without authority of law, and for its cause of action, plaintiff complains and alleges:

1. That the defendant is, and at all times herein mentioned was, a corporation duly incorporated under the laws of the State of Minnesota, and a carrier by railroad subject to the Interstate Commerce Act, owning and, except during the period of Federal control hereinafter referred to, operating a railroad and system of transportation in the States of Minnesota, Wisconsin, Iowa, North Dakota, South Dakota, Montana, Idaho, Washington and Oregon, and also owning the stock of certain subsidiary railway corporations which own railroads in the United States and of certain other subsidiary railway corporations which own railroads in Canada;

2. That on December 31, 1917 the President of the United States took possession of said railroad owned by defendant and of the railroads in the United States owned by defendant's subsidiary corporations, under the provisions of the United States Federal Possession and Control Act
22 of August 29, 1916 (39 Stat. L. 645), and continued to operate said railroad under said Act and under the Federal Control Act of March 21, 1918 (40 Stat. L. 451) until March 1, 1920;

3. That on December 30, 1918, W. G. McAdoo, Director General of Railroads for the United States, entered into a contract with defendant and its subsidiary companies owning railways in the United States fixing the annual compensation to be paid to defendant and said subsidiary companies under Section 1 of the Federal Control Act;

4. That Section 209 of the Transportation Act of 1920, (41 Stat. L. 464) provided a guaranty by the United States to any carrier with which such a contract fixing the amount of compensation under the Federal Control Act had been made, which guaranty provided that the railway operating income of such carrier for the six months period beginning March 1, 1920 should not be less than one-half the amount named in such contract as annual compensation, and paragraph (b) of said Section 209 provided that said Section 209 would be applicable only to such carriers as filed with the Commission, on or before March 15, 1920, a written statement accepting all the provisions of said Section 209;

5. That prior to March 15, 1920 the defendant and its subsidiary companies owning railways in the United States filed with the Interstate Commerce Commission (hereinafter called the "Commission") a written statement that they accepted all the provisions of Section 209 of the Transportation Act of 1920, and the guaranty thus became applicable to defendant;

6. That during and following the six months period beginning March 1, 1920 the Commission, pursuant to the provisions of paragraph (h) of Section 209 of the Transportation Act of 1920, upon application of defendant, issued certificates to the Secretary of the Treasury to the effect that certain advances should be made to defendant under paragraph (h) of said Section 209, the Commission basing the amount
23 of the advances so certified upon an examination of statements submitted by defendant and other data available to the Commission at the time said certificates were issued, the number, date, and amount of said certificates being as follows:

Number of Certificate	Date of Certificate and Date Therein Specified for Payment	Amount
A- 65	June 25, 1920	$3,000,000.
A-225	August 31, 1920	2,000,000.
A-276	November 4, 1920	1,500,000.
		$6,500,000.

(Certificates A-65, A-225 and A-276 are reproduced and made a part hereof in Appendices "A", "B" and "C" hereto annexed);

7. That thereafter and on March 1, 1921, in accordance with paragraph (g) of Section 209 of the Transportation Act of 1920, as amended on February 26, 1921 by Section 212 of said Act (41 Stat. L. 1145), the Commission issued to the Secretary of the Treasury its certificate, No. A-329 (a copy of this certificate, marked "Appendix D", is hereto annexed and made a part hereof), to the effect that an additional $6,000,000 was necessary to make good the guaranty to defendant provided by said Section 209, the amount so certified being based upon statements under oath submitted by defendant on form of claim sent by the Commission to defendant, and upon other data available to the Commission at that time;

8. That pursuant to certificates No. A-65, A-225, A-276 and A-329, and shortly after the issuance of each, the Secretary of the Treasury transmitted to defendant the several amounts indicated by each such certificate, thereby transmitting to defendant a total amount of $12,500,000;

9. That before receiving any of the amounts heretofore

mentioned, defendant executed a contract with the Secretary of the Treasury of the United States, as required
24 by paragraph (h) of Section 209 of the Transportation Act of 1920, to the effect that upon final determination of the amount of the guaranty provided for by said Section 209 defendant would repay to the United States any amounts received by it from advances under Paragraph (h) of said Section 209 in excess of the amount of said guaranty, with interest at the rate of six per cent per annum from the time such excess was advanced;

10. That under date of June 17, 1925 the Commission, acting under authority of Paragraph (g) of Section 209 of the Transportation Act of 1920, issued its certificate, No. A-1041, (a copy of this certificate, marked "Appendix E", is hereto annexed and made a part hereof) addressed to the Secretary of the Treasury, which set forth that $11,198,887.31 was the amount necessary to make good to defendant the guaranty provided by said Section 209, and under date of June 22, 1925 the Treasury Department addressed to the Comptroller of defendant a letter (copy of this letter, marked "Appendix F", is hereto annexed and made a part hereof) demanding that defendant refund to the Treasury $1,321,-112.69, which amount represented the difference between the total amount transmitted to defendant pursuant to Certificates No. A-65, A-225, A-276 and A-329 and the amount due defendant as certified by the Commission in Certificate No. A-1041, dated June 17, 1925;

11. That defendant refused to refund to the Treasury the amount so demanded, and that a rehearing, upon application of defendant was had before the Commission, which, on June 8, 1926, issued its amended certificate, No. A-1041, (a copy of this certificate, marked "Appendix G", is hereto annexed and made a part hereof), canceling the certificate bearing the same number dated June 17, 1925, which amended certificate certified that $11,170,214.02 was the amount necessary to make good to defendant the guaranty provided by Section 209 of the Transportation Act of 1920, and said amended certificate was delivered to the Secretary of the Treasury, and the Treasury Department under
25 date of July 8, 1926, addressed to the Comptroller of defendant a letter (a copy of this letter, marked "Appendix H", is hereto annexed and made a part hereof) demanding that defendant refund to the Treasury $1,329,-785.98, which amount represented the difference between the total amount transmitted to and received by defendant pursuant to Certificates No. A-65, A-225, A-276 and A-329 and

the amount due defendant as shown by said amended certificate No. A-1041, dated June 8, 1926, and that defendant refused to refund the amount so demanded in said letter;

12. That said sum of $1,329,785.98 was had and received by defendant to the use of the plaintiff and was paid by the plaintiff to, and received by defendant in and through mistake and without authority of law, in that, in issuing the aforesaid certificates for advances under said Section 209 (h) and said certificate for a partial payment under Section 209, as amended by Section 212, the Commission erroneously and incorrectly found and certified that a total of $12,500,000 was the amount necessary to make good to defendant the guaranty provided by Section 209, which said error and mistake was corrected by the Commission, acting in pursuance of its authority conferred by said Sections 209 and 212, through, by, and upon its final determination of the amount necessary to make good said guaranty to defendant, made and contained in its said amended Certificate No. A-1041, annexed hereto and made a part hereof as "Appendix G", wherein the Commission found and determined that the true and correct amount of said guaranty to defendant was $11,170,214.02; and plaintiff alleges that said sum of $12,500,000 so certified, paid to, and received by defendant was not the true and correct amount of said guaranty, and that the true and correct amount thereof was and is $11,170,214.02, as ascertained and found by the Commission in and upon its final determination made and set forth in its said amended Certificate No. A-1041.

13. That the sum of $1,329,785.98 is due to plaintiff anl payment of said sum, or any part thereof, has been and still is wholly refused by defendant.

26 Wherefore, plaintiff prays judgment against defendant for the sum of $1,329,785.98, together with lawful interest thereon from and after March 2, 1921 (the date the overpayment was made), and for the costs of this action.

LEWIS L. DRILL
United States Attorney for the District of Minnesota.

WILLIAM D. MITCHELL
Attorney General.

JOHN LORD O'BRIAN
Assistant to the Attorney General.

ELMER B. COLLINS
WENDELL BERGE
Special Assistants to the Attorney General.

27 District of Columbia, ss:

Elmer B. Collins, being duly sworn, says that he is a Special Assistant to the Attorney General of the United States, that he has read the foregoing complaint and knows the contents thereof, and that he is informed and verily believes the allegations therein to be true.

ELMER B. COLLINS

Subscribed and sworn to before me this 14th day of February, 1931.

HAROLD L. SCHILZ
(Seal) Notary Public, District of Columbia

28 State of Minnesota } ss.
County of Ramsey }

Lewis L. Drill, being duly sworn, says that he is the United States Attorney for the District of Minnesota; and that he is authorized to sign the above complaint on behalf of the United States by the Attorney General of the United States, and that, upon his information and belief, the allegations of said complaint are true.

LEWIS L. DRILL

Subscribed and sworn to before me this 19 day of March, 1931.

GEORGE A. HEISEY
(Seal) Notary Public, Ramsey County, Minn.

My commission expires 3-18-32.

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29 (Appendix A)

Interstate Commerce Commission
Washington

Certificate No. A-65
(Application No. A-77)

Certificate of Interstate Commerce Commission Under Section 209(h), Transportation Act, 1920.

To the Secretary of the Treasury of the United States:

The Interstate Commerce Commission hereby certifies that the Great Northern Railway Company, a corporation of the State of Minnesota, hereinafter termed the company, is a

carrier as defined in subdivision (a) of Section 209 of the Transportation Act, 1920; that the company filed with the said Commission, on or before March 15, 1920, a written statement that it accepted all of the provisions of the said Section 209; that thereafter the company made application to the said Commission asking that during the guaranty period there might be advanced to it a certain sum or sums to enable it to meet its fixed charges; that the said Commission has made investigation in the premises; that the following sum, or the aggregate of the following sums, together with any other sum or sums heretofore advanced to the company under said Section 209, is not in excess of the estimated amount necessary to make good the guaranty of the United States to the company under the provisions of said section and is necessary to enable the company to meet its fixed charges; and that an advance, or advances, shall be made to the company in the amount, or amounts, and at the time, or times, as specified below, namely:

Three million dollars ($3,000,000), June 26, 1920.
(Seal.)

Dated this 26th day of June, 1920.

By the Commission,
Division 4. GEORGE B. McGINTY,
Secretary.

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30 (Appendix B)
Interstate Commerce Commission
Washington

Certificate No. A-225
(Application No. A-212)

Certificate of Interstate Commerce Commission Under Section 209(h), Transportation Act, 1920.

To the Secretary of the Treasury of the United States:

The Interstate Commerce Commission hereby certifies that the Great Northern Railway Company, a corporation of the State of Minnesota, hereinafter termed the company, is a carrier as defined in subdivision (a) of Section 209 of the Transportation Act, 1920; that the company filed with the said Commission, on or before March 15, 1920, a written statement that it accepted all of the provisions of the said Section 209; that thereafter the company made application

to the said Commission asking that during the guaranty period there might be advanced to it a certain sum or sums to enable it to meet its operating expenses; that the said Commission has made investigation in the premises; that the following sum, or the aggregate of the following sums, together with any other sum or sums heretofore advanced to the company under said Section 209, is not in excess of the estimated amount necessary to make good the guaranty of the United States to the company under the provisions of said section and is necessary to enable the company to meet its operating expenses; and that an advance, or advances, shall be made to the company in the amount, or amounts, and at the time, or times, as specified below, namely:

Two million dollars ($2,000,000), August 31, 1920.

(Seal.)

Dated this 31st day of August, 1920.

By the Commission,
Division 4.

GEORGE B. McGINTY,
Secretary.

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31 (Appendix C)

Interstate Commerce Commission
Washington

Certificate No. A-276
(Application No. A-212)

Certificate of Interstate Commerce Commission Under Section 209(h), Transportation Act, 1920.

To the Secretary of the Treasury of the United States:

The Interstate Commerce Commission hereby certifies that the Great Northern Railway Company, a corporation of the State of Minnesota, hereinafter termed the company, is a carrier as defined in subdivision (a) of Section 209 of the Transportation Act, 1920; that the company filed with the said Commission, on or before March 15, 1920, a written statement that it accepted all of the provisions of the said Section 209; that thereafter the company made application to the said Commission asking that during the guaranty period there might be advanced to it a certain sum or sums to enable it to meet its operating expenses; that the said Commission has made investigation in the premises; that the

following sum, or the aggregate of the following sums, together with any other sum or sums heretofore advanced to the company under said Section 209, is not in excess of the estimated amount necessary to make good the guaranty of the United States to the company under the provisions of said section and is necessary to enable the company to meet its operating expenses; and that an advance, or advances, shall be made to the company in the amount, or amounts, and at the time, or times, as specified below, namely:

One million, five hundred thousand dollars ($1,500,000), November 4, 1920.

(Seal.)

Dated this 4th day of November.

By the Commission,
Division 4.

GEORGE B. McGINTY,
Secretary.

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32 (Appendix D)

Finance Docket No. 501

Interstate Commerce Commission
Washington

Certificate No. A-329

Certificate of Interstate Commerce Commission Under Section 209(g), Transportation Act, 1920, as Amended by Section 212.

To the Secretary of the Treasury of the United States:

1. The Commission hereby certifies that it has this date cancelled certificate No. A-328, dated the 23rd day of February, 1921, which certified to the Secretary of the Treasury of the United States a payment of Six million dollars ($6,000,000) in favor of the Great Northern Railway Company.

2. The Interstate Commerce Commission, hereinafter called the Commission, hereby certifies that the Great Northern Railway Company, a corporation of the state of Minnesota, hereinafter called the carrier, is a carrier as defined in paragraph (a) of section 209 of the Transportation Act, 1920, in that it is a carrier by railroad whose railroad or system of transportation was under Federal control at the time such Federal control terminated at 12:01 A. M. on March 1, 1920;

that the carrier filed with the Commission on or before March 15, 1920, a written statement that it accepted all of the provisions of the said section 209.

3. The Commission has ascertained and hereby certifies to the Secretary of the Treasury that the amount of Six million dollars ($6,000,000) in addition to any other sum or sums heretofore certified in favor of the carrier under section 209 of the Transportation Act, 1920, is necessary to make good to said carrier the guaranty provided by the said section.

4. The Commission hereby certifies that such amount of Six million dollars ($6,000,000) cannot be reduced by further accounting or otherwise, and there may be, upon further investigation, additional amounts found due to said Great Northern Railway Company to make good to said carrier the guaranty of section 209 of the Transportation Act, 1920, and which if, and when, ascertained by the Commission will be certified to the Secretary of the Treasury.

Dated this 1st day of March, 1921.

By the Commission,
Division 4.

GEORGE B. McGINTY,
Secretary.

(Seal)

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33 (Appendix E)

Interstate Commerce Commission
Washington

Finance Docket No. 501
Certificate No. A-1041

Certificate of Interstate Commerce Commission Under Section 209 (g), Transportation Act, 1920.

To the Secretary of the Treasury of the United States:

1. The Interstate Commerce Commission, hereinafter called the Commission, hereby certifies that the Great Northern Railway Company, a corporation of the State of Minnesota, the Farmers' Grain & Shipping Company, a corporation of the State of North Dakota, and the Watertown & Sioux Falls Railway Company, a corporation of the State of South Dakota, hereinafter called the carriers, are carriers as defined in paragraph (a) of section 209 of the Transportation Act, 1920; and that the carriers filed with the Commission on or before March 15, 1920, written statements that they accepted all of

the provisions of said section 209 and that the two companies last mentioned individually filed with the Commission resolutions passed by their respective boards of directors authorizing the Great Northern Railway Company to act as their agent in effecting settlement under said section 209 and to receive payment of any sum or sums due them thereunder; said companies being under common control through direct or indirect ownership of their capital stock and composing a single system of transportation.

2. The Commission has ascertained, and hereby certifies to the Secretary of the Treasury, that the amount of $11,178,887.31 is the amount necessary to make good to said carriers the guaranty provided by section 209 of the Transportation Act, 1920.

3. The Commission has heretofore certified to the Secretary of the Treasury as advances under section 209 (h) an aggregate amount of $6,500,000, as follows:

Certificate No. 65, June 25, 1920.....$3,000,000
Certificate No. 225, August 31, 1920... 2,000,000
Certificate No. 276, November 4, 1920 1,500,000

and as partial payment under section 209 (g), as amended by section 212, an amount of $6,000,000 on March 1, 1921, under certificate No. A-329.

4. The Commission hereby certifies that the amount due the United States on account of overpayment to the carrier under section 209 (g) is $1,321,112.69.

5. The Commission has made final determination as aforesaid of the amount of the guaranty provided for by section 209 of the Transportation Act, 1920.

Dated this 17th day of June, 1925.

By the Commission.
Division 4.

GEORGE B. McGINTY,
Secretary.

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34 (Appendix F)

June 22, 1925.

Sir:

The Treasury has received from the Interstate Commerce Commission its certificate A-1041, dated June 17, 1925, which certifies that the amount of $11,178,887.31 is the amount nec-

essary to make good to the Great Northern Railway Company (including the Farmers' Grain and Shipping Company and the Watertown and Sioux Falls Railway Company) the guaranty provided by Section 209 of the Transportation Act, 1920, as amended.

This certificate also contains a certification that the amount of $1,321,112.69 is due the United States on account of an overpayment made to the Company pursuant to Interstate Commerce Commission Certificates, as follows:

Ctf. No.	Dated	Amount
65	June 25, 1920	$3,000,000
225	Aug. 31, 1920	2,000,000
276	Nov. 4, 1920	1,500,000
329	Mar. 1, 1921	6,000,000

You are requested to make payment to the Federal Reserve Bank of Minneapolis of $1,321,112.69, together with interest thereon from March 2, 1921, the date the overpayment was made, to the date of repayment at the rate of 6% per annum (365 day basis), in accordance with the provisions of Section 209 (h) of said act. The Federal Reserve Bank of Minneapolis has been given instructions with reference to the disposition of the amount when received. Assuming June 30, 1925 to be the date which the repayment will be made, the interest covering the period of 4 years, 120 days at 6% (365 day basis) amounts to $343,127.35, making the total payment $1,664,240.04 if paid on that date. The daily interest on $1,321,112.69 amounts to $217.1692. If the payment is made before or after June 30, 1925, the total payment should be decreased or increased by the daily interest accordingly.

By direction of the Secretary.

Respectfully,

GARRARD B. WINSTON,
Undersecretary of the Treasury.

GEORGE H. HESS, JR., Esq.,
Comptroller, Great Northern Railway Co.,
St. Paul, Minn.
O'D-DWT

35 (Appendix G)

Interstate Commerce Commission
Washington

Finance Docket No. 501 (This certificate also embraces Finance Dockets Nos. 463 and 879)
Amended Certificate No. A-1041.

Amended Certificate of Interstate Commerce Commission Under Section 209 (g), Transportation Act, 1920.

(Cancels Certificate No. A-1041 dated June 17, 1925.)

To the Secretary of the Treasury of the United States:

1. The Interstate Commerce Commission, hereinafter called the Commission, hereby certifies that the Great Northern Railway Company, a corporation of the State of Minnesota, the Farmers' Grain & Shipping Company, a corporation of the State of North Dakota, and the Watertown & Sioux Falls Railway Company, a corporation of the State of South Dakota, hereinafter called the carriers, are carriers as defined in subdivision (a) of section 209 of the Transportation Act, 1920, and that the carriers filed with the Commission on or before March 15, 1920, written statements that they accepted all of the provisions of said section 209 and that the two companies last mentioned individually filed with the Commission resolutions passed by their respective boards of directors authorizing the Great Northern Railway Company to act as their agent in effecting settlement under said section 209 and to receive payment of any sum or sums due them thereunder, said companies being under common control through direct or indirect ownership of their capital stock and composing a single system of transportation.

2. The Commission has ascertained, and hereby certifies to the Secretary of the Treasury, that the amount necessary to make good to said Great Northern Railway Company the guaranty provided by section 209 of the Transportation Act, 1920, is $11,170,214.02; that the amount necessary to make good said guaranty to said Farmers' Grain & Shipping Company is $31,418.88; and that the amount necessary to make good said guaranty to the said Watertown & Sioux Falls Railway Company is $75,698.89.

3. The Commission has heretofore certified to the Secretary of the Treasury as advances under section 209 (h) to said Great Northern Railway Company an aggregate amount of $6,500,000, as follows:

36 Certificate No. 65, June 25, 1920.....$3,000,000
Certificate No. 225, August 31, 1920..... 2,000,000
Certificate No. 276, November 4, 1920..... 1,500,000

and as partial payment to said Great Northern Railway Company under section 209 (g), as amended by section 212, an amount of $6,000,000 on March 1, 1921, under certificate No. A-329.

4. The Commission has made final determination as aforesaid of the amount of the guaranty provided for by section 209 of the Transportation Act, 1920.

Dated this 8th day of June, 1926.

By the Commission.

GEORGE B. McGINTY
Secretary.

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37 (Appendix H.)

July 8, 1926.

George H. Hess, Jr., Esq.,
Comptroller, The Great
Northern Railway Company,
St. Paul, Minn.

Dear Sir:

Please refer to previous correspondence relative to certificate No. A-1041 of the Interstate Commerce Commission, dated June 17, 1925, which certified that in connection with advances and partial payments made under the provisions of Section 209 of the Transportation Act, there was due the United States from the Great Northern Railway Company, The Farmers' Grain and Shipping Company, and the Watertown and Sioux Falls Railway Company the sum of $1,321,-112.69.

The Treasury has received from the Interstate Commerce Commission an amendment, dated June 8, 1926, to its certificate No. A-1041. The amended certificate states that the amount necessary to make good the guaranty provided by Section 209 of the Act to the carriers involved is as follows:

Great Northern Railway Company	$11,170,214.02
Farmers' Grain and Shipping Co.	31,418.88
Watertown and Sioux Falls Ry. Co.	75,698.89
	$11,277,331.79

After deducting the amount of $11,170,214.02 from the amount of $12,500,000 paid the Great Northern Railway Company, there is due the United States from the Company the sum of $1,329,785.98. You are requested to make payment to the Treasury of the amount of $1,329,785.98 in funds available for immediate credit. Check or voucher should be drawn payable to the order of the Secretary of the Treasury and transmitted to this office with letter of advice.

Amended certificate No. A-1041 of the Interstate Commerce Commission will be transmitted in due course to the Comptroller General of the United States for examination and settlement with a recommendation that warrants
38 be issued in favor of Farmers' Grain and Shipping Company and the Watertown and Sioux Falls Railway Company for the amounts due these carriers.

Very truly yours,

GARRARD B. WINSTON
O'D-NLE Undersecretary of the Treasury.

Indorsed: Amended Complaint filed March 19, 1931. Joel M. Dickey, Clerk. By Margaret L. Mullane, Deputy.

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39 (Answer.)

For its answer to the amended Complaint herein defendant alleges:

I.

Admits paragraphs one (1), two (2), three (3), four (4), five (5), six (6), seven (7), and eight 8) of said complaint.

II.

Admits paragraph nine (9), but denies that the refund agreement had any reference to the payment of $6,000,000.00.

III.

Admits paragraph ten (10) of said complaint, except the last four lines thereof, reading as follows: "which amount represented the difference between the total amount transmitted to defendant pursuant to Certificates No. A-65, A-225, A-276 and A-329 and the amount due defendant as certified by the Commission in Certificate No. A-1041, dated June 17, 1925".

IV.

Admits paragraph eleven (11), except the following in the last five lines thereof: "which amount represented the difference between the total amount transmitted to and received by defendant pursuant to Certificates No. A-65, A-225, A-276 and A-329 and the amount due defendant as shown by
40 said amended Certificate No. A-1041, dated June 8, 1926".

V.

Admits the following part of paragraph thirteen (13): "payment of said sum, or any part thereof, has been and still is wholly refused by defendant".

VI.

Except as hereinabove admitted or qualified, defendant denies each and every allegation of said complaint and each and every part thereof.

Wherefore, defendant demands judgment that plaintiff take nothing and that defendant have its costs and disbursements therein.

F. G. DORETY
R. J. HAGMAN
J. H. MULALLY
Attorneys for Defendant,
1120 Great Northern Bldg.,
Saint Paul, Minnesota.

Due and personal service of the within is hereby admitted this 23rd day of May, 1931.

LEWIS L. DRILL,
by G. A. HEISEY,
Ass't. Att'y for Plaintiff

Indorsed: Answer Filed May 23 1931 Joel M. Dickey, Clerk. By Margaret L. Mullane Deputy.

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41 (Trial, June 22, 1931.)

April Term, 1931. Before Judge Sanborn.

The above entitled action came on this day to be tried to the Court, trial by jury having been expressly waived by stipulation of the parties hereto; Messrs. Elmer B. Collins and

Wendell Berge, Special Assistants to the Attorney General and Mr. Lewis L. Drill, United States Attorney, appearing as attorneys for the plaintiff herein and Messrs. F. G. Dorety, R. J. Hagman and J. H. Mulally appearing as attorneys for the defendant.

Mr. Collins states the case to the Court on behalf of the plaintiff.

Morton T. May is sworn, is examined and testifies as a witness on behalf of the plaintiff.

Further trial of said action is continued to 10 a. m. June 23, 1931.

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42 (Trial, June 23, 1931.)

April Term, 1931. Before Judge Sanborn.

The above entitled action came on this day to be further tried to the Court; the parties thereto appearing by their attorneys respectively as on the preceding day and the following proceedings are had:

Morton T. May is recalled, is examined and further testifies under cross-examination, as a witness on behalf of the plaintiff.

Further trial of said action is continued to 10 A. M. June 24, 1931.

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43 (Trial, June 24, 1931; Motions of Plaintiff and Defendant for Judgment.)

April Term, 1931. Before Judge Sanborn.

The above entitled action came on this day to be further tried to the Court; the parties thereto appearing by their attorneys respectively as on the preceding day; and the following proceedings are had:

Morton T. May is recalled, is examined and further testifies as a witness on behalf of the plaintiff under cross-examination.

Here the plaintiff rests its case.

Verner P. Turnburke is sworn, is examined and testifies as a witness on behalf of the defendant.

Val N. Wahlberg is sworn, is examined and testifies as a witness on behalf of the defendant.

William Wyer is sworn, is examined and testifies as a witness on behalf of the defendant.

Here the defendant rests its case.

Mr. Collins argues the case to the Court on behalf of the plaintiff.

Mr. Berge concludes the summing up of the case to the Court on behalf of the plaintiff.

Attorneys for the respective parties move the Court for judgment in favor of the respective parties on the sole ground that the record supports no other disposition of the case, the party whose motion is denied to be allowed an exception.

Mr. Dorety sums up the case to the Court on behalf of the defendant.

The Court finds in favor of the defendant and that the plaintiff take nothing by its said action and that the same be and the same hereby is dismissed on its merits, with an exception allowed to plaintiff.

A stay of forty two days from the date of the entry of judgment is granted plaintiff.

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44 (Judgment, June 26, 1931.)

In the District Court of the United States
For the District of Minnesota

United States of America,
Plaintiff,
vs.
Great Northern Railway Company,
Defendant.
} Law No. 2246.

The above entitled action having been regularly tried before this Court without a jury on June 22nd, 23rd, and 24th, 1931, and the Court having on June 24th, 1931, rendered its decision and findings that plaintiff, United States of America, take nothing and that judgment be entered in favor of defendant, Great Northern Railway Company;

By reason of the premises:

It Is Ordered and Adjudged:

That plaintiff, United States of America, take nothing in this action and that the same be and hereby is dismissed with prejudice.

JOHN B. SANBORN
District Judge.

Dated June 26, 1931.

Indorsed: Judgment filed June 26 1931 Joel M. Dickey, Clerk. By Margaret L. Mullane, Chief Deputy.

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45 Notice of Appeal

In the District Court of the United States
for the District of Minnesota

United States of America,
Plaintiff,
v.
Great Northern Railway Company,
Defendant.
At Law
No. 2246

To Great Northern Railway Company,
F. G. Dorety, Esq.,
Vice President and General Counsel for Defendant,
St. Paul, Minnesota.

You will please take notice that the above-named plaintiff, United States of America, considering itself aggrieved by the judgment of the Court made and entered in the above-entitled cause on June 26, 1931, does hereby appeal to the United States Circuit Court of Appeals for the Eighth Circuit from such judgment.

This appeal is taken upon questions of fact and of law and is based upon the records, files, assignments of error and other papers filed herein.

LEWIS L. DRILL
United States Attorney for the District of Minnesota

ELMER B. COLLINS
Special Assistant to the Attorney General

Dated at St. Paul, Minnesota, this 25th day of September, 1931.

Due service of the foregoing notice of appeal by copy thereof is hereby admitted, at St. Paul, Minnesota, this 25th day of September, 1931.

F. G. DORETY
Attorney for the Defendant

Indorsed: Notice of Appeal filed September 25 1931 Joel M. Dickey, Clerk. By Kathryn F. O'Connor Deputy.

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46 Petition for Appeal

The above-named plaintiff, United States of America, considering itself aggrieved by the judgment entered in the above-entitled cause on June 26, 1931, and desiring to appeal from said judgment to the United States Circuit Court of Appeals for the Eighth Circuit, presents herewith its notice of appeal and assignments of error, and prays for an order of this Court allowing said appeal, and for a citation directed to the above-named defendant, Great Northern Railway Company, requiring it to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, Missouri, within forty days from and after the date of said citation, pursuant to said appeal.

LEWIS L. DRILL
United States Attorney for the District of Minnesota

ELMER B. COLLINS
Special Assistant to the Attorney General

Dated at St. Paul, Minnesota, this 25th day of Setember, 1931.

Indorsed: Petition for Appeal filed September 25 1931 Joel M. Dickey, Clerk. By Kathryn F. O'Connor Deputy.

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47 Order Allowing Appeal

The above named plaintiff, United States of America, having duly presented its petition for appeal, and having duly served and filed its notice of appeal and assignments of error, and this being an appeal by the United States of whom, under Section 1001, Revised Statutes, no bond on appeal is required, the prayer of said plaintiff is hereby granted, and accordingly

It is Ordered that the appeal of said plaintiff, United States of America, be and the same is hereby allowed.

Dated this 25th day of September, 1931.

JOHN B. SANBORN
Judge, United States District Court
For the District of Minnesota

Indorsed: Order Allowing Appeal filed September 25 1931 Joel M. Dickey, Clerk. By Kathryn F. O'Connor Deputy.

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48 Assignments of Error

United States of America, the above named plaintiff, by its attorneys, Lewis L. Drill, United States Attorney in and for the District of Minnesota, and Elmer B. Collins, Special Assistant to the Attorney General of the United States, in the above entitled cause comes now and files the following assignments of error upon its appeal from the judgment entered in said cause by this Court on June 26, 1931.

I

The Court erred in denying the plaintiff's motion for judgment made on the ground that there was no substantial evidence of record to support any other conclusion than that plaintiff was entitled to judgment.

Wherefore, plaintiff prays that the judgment entered in this cause June 26, 1931, in favor of defendant, be in all respects reversed, set aside and vacated, and that judgment be entered accordingly for the plaintiff.

LEWIS L. DRILL
United States Attorney for the District of Minnesota

ELMER B. COLLINS
Special Assistant to the Attorney General

Dated at Saint Paul, Minnesota, this 25th day of September, 1931.

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49 Due service of the foregoing Assignments of Error, by copy thereof, is hereby admitted at Saint Paul, Minnesota, this 25th day of September, 1931.

F. G. DORETY
Attorney for the Defendant

Indorsed: Assignments of Error Filed September 25 1931 Joel M. Dickey, Clerk. By Kathryn F. O'Connor, Deputy.

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50 (Bill of Exceptions)

United States District Court
District of Minnesota
Third Division

United States of America,
Plaintiff,
vs.
Great Northern Railway Company,
Defendant.
Law
No. 2246

The above entitled matter came on for hearing at a special term of the above named court in the federal building of the City of St. Paul, State and District of Minnesota, on the 22nd day of June, 1931, before the Honorable John B. Sanborn, Judge, presiding. Messrs. Lewis L. Drill, United States Attorney and Elmer B. Collins and Wendell Berge, Special Assistants to the Attorney General, appearing for and on behalf of the plaintiff, and Messrs. F. G. Dorety, R. J. Hagman and J. H. Mulally, appearing for and on behalf of the defendant, whereupon the following proceedings were had and testimony taken, to-wit:—

51 Morton T. May, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct-Examination

By Mr. Collins:

That he was employed as Chief Accountant and Auditor in the Bureau of Finance of the Interstate Commerce Commission, his duties being to analyze returns submitted by carriers, to suggest reports and write up the results of said analyses; that he also had charge of other accountants who do that work; that he had been so employed over eleven years, approximately since the date of the organization of the Bureau of Finance, and that previous to that employment, he was an accountant and analyst in that Commission's Bureau of Statistics, engaged in analyzing annual reports of carriers and in examining such reports and doing statistical work in the latter bureau.

That in his position as Chief Accountant in the Bureau of Finance, he had charge of the examination of carriers' returns submitted in support of their claims under the guaranty provision Section 209, Transportation Act 1920, and in that capacity made accounting and statistical analyses of such returns.

That after March 1, 1920, the Commission issued its circular which suggested to the railroads the form in which data should be submitted by them in making application for advances under Section 209, the purpose of such circular being largely for uniformity in applications of all carriers. The circular asked a series of questions which were intended to establish the rights of carriers to the benefits of Section 209. The form of that circular was followed by the Commission in issuing its order of October 18, 1920, which prescribed more fully and completely the information to be furnished by carriers claiming the benefits of the guaranty.

52 That the Great Northern Railway Company filed its first application for an advance with the Commission on June 14, 1920, and as to the general character of information submitted with that application, the Commission desired to establish the rights of the carrier to the benefits of Section 209, and those rights were intended to be brought out by the answers which the carrier made in its return to the questions asked in the Commission's circular from which the Commission sought to establish the amount of the guaranty to each carrier. There was a table or a form provided which the carrier should fill in showing the results of their operations during the test period; that is the period of three years from July 1, 1914 to June 30, 1917. The guaranty would be equal to one-half the annual compensation paid by the Railroad Administration to the carrier during Federal Control, or one-half the amount named as annual compensation to the carrier in the contract between the carrier and the Director General for just compensation to the carrier, if such contract had been made. If no such contract had been made, the guaranty would be one-sixth of the total earnings of the carrier for the three year test period. The amount named in the contract between the Director General and the Great Northern Railway as annual compensation was finally determined to be $28,613,045.30, with perhaps some later slight modification. The guaranty, of course, would be one-half of that or approximately $14,000,000.

That the information the Commission asked for in connection with applications for advances was as to the results so

far as available, of the carriers' operations during the months of the guaranty period. The Great Northern's first application for advance being filed June 14, 1920, and the guaranty period not having been completed at that time, the
53 Great Northern obviously would be unable to give us complete results but could give us results of their operation only for the months that had been completed and entered on their books. In connection with the application for an advance, it was required to file returns showing the results of operations during those months that had been entered. Then in subsequent months that had not been entered in their books, the carriers were asked to give their estimate for those months. In addition to that return, the Commission required, in its first circular, data from those same months for the years 1918 and 1920, the purpose being very largely to enable the Commission to make a comparison of what the carrier was doing in 1920 with what had been done in 1918 and 1919 and incidentally also with the test period, so that we had comparisons with 1918 and 1919, especially for the months that were estimated by the carrier and also for the figures that the carrier had entered on its books and submitted as closed, that is not closed in the sense that they cannot modify it, but when the carrier reaches a point when it has all of the accounts in and feels that there is nothing else to come in at a date somewhat subsequent to the end of the month, it closes the books for that month, and then any items that come in later are entered in the subsequent month. That, generally speaking, was the data that was called for by this circular that the Commission issued. It was not in the form of an order and was not intended as a requirement of the carriers to file anything, but if the carrier chose to make application for an advance, then the Commission desired the information in that form. The months for which the Commission required information during the Federal Control period corresponded to the six months of the guaranty period.

The witness stated that he had extracted and had before him certain portions of the defendant's data submitted
54 with its first application for an advance. Describing the character of information furnished by the defendant with its first application, the witness mentioned the carrier's statement of its income account for the guaranty period months in connection with comparative returns for the same months in the years 1918 and 1919; that this statement contained figures that had been entered in the defendant's books showing the results of its operations for the months of March

and April, and estimates made by the defendant for the remaining four months of the guaranty period. On the statement the carrier shows the actual figures entered on its books for the month of March, as a deficit of $267,282.59. The actual figures for April are shown and estimates are shown for May, June, July and August, making a total of $7,567,924.03 as the net income the defendant anticipated earning for the guaranty period, which, when subtracted from the standard return, that is one-half the amount named in the contract with the Director as annual compensation, would leave a deficiency of $6,817,756.36, which the carrier states had been made up from estimates but that the figures have been very carefully prepared, and it is believed that they will not vary greatly from the actual figures when they are determined. In addition we had, of course, other data in the circular and made an estimate, or you might say we followed the carrier's estimate. This data was returned in good faith, and we had very great confidence in the abilities of the carrier's representatives to give us correct returns, and we rather more or less hastily went over this. Our Bureau was new, had just been organized with a force of new accountants handling a new law with which we were not familiar, and we considered the carriers' estimates as good or better than we could make. But we made some deductions in the carriers' estimates, considering the various figures submitted by them on estimates, and then considered the residue as being
55 susceptible of an advance with a reasonable margin of safety.

This statement was submitted only by general and not primary accounts, therefore, we could give consideration only to general accounts. We did make reasonably close scrutiny of the amounts stated in the general accounts in comparison with the prior years, and we made some comparison of the prior years' accounts with the annual reports. For illustration, the carrier gave us the six months of the guaranty period and the annual reports covering a full year. In case the six months of the guaranty period was materially different than half the total for the year, we made some comparison with the carriers' monthly reports on file, and if there was some material difference in the amounts, we asked for an explanation, but if it looked reasonable in view of the amount of revenues the carrier had in comparison with prior years, and such statistics as were available to us concerning their volume of traffic, etc., we as a rule accepted the carrier's estimates unless we saw something that appeared unreasonable on the face of it, in which event, we gave the

carrier an opportunity to explain. If the explanation was satisfactory, possibly we accepted it as a return by the carrier or in some cases made some adjustment which it was thought would protect the Government.

That between the time the defendant's data was furnished with its first application and the time the first certificate was issued, for an advance, there had been no examination of the defendant's books whatever, that is, in the sense of an accounting. At that time, it was obvious that that could not be done until long after the close of the guaranty period. The books had been examined for the test period but that had not been definitely settled. There were exceptions to test period accounts that had not then been agreed to between the carrier and the Bureau of Accounts. Those test period exceptions of this defendant which had not
56 been settled entirely amounted to some $25,000. The application was filed on June 14th, and the certificate was issued on June 26, 1920, for $3,000,000, which was the exact amount the carrier applied for.

(The certificate of June 26, 1920 was offered and received in evidence and is included herewith as page 1 of Government Exhibit 1.)

On August 23, 1920, the Great Northern filed its application for a second advance. At that time they filed data similar to that which had been filed previously except that they gave their book figures for actual operations for the first four months, March, April, May and June of 1920, and their estimates for the months of July and August only. That application was for an advance of $3,500,000. The Commission made just about the same examination of this data as it made of the data submitted with the first application. The examinations were not materially different. The Commission was in possession of some additional information not only from the carrier itself but from other sources. The total amount of the income and the anticipated income of the carrier was shown on this return to be $3,936,588.20, as compared with what it had estimated in its previous return of approximately $7,000,000. The difference between those figures would represent an additional amount due the carrier from the Government and is explained by the note in connection therewith stating that a deficit in August 1920 was caused by inclusion of 4,000,000 for increase in wages retroactive to May 1, 1920, granted under a decision of the United States Railroad Labor Board rendered July 20, 1920. That very satisfactorily accounted to the Commission for the

difference in the two estimates and whether or not the amount would be exactly that much, the Commission for its immediate purposes accepted the carrier's estimate of $4,000,000. With the income calculated on this return, a deficiency of $10,000,000 would be left, which, after sub-
57 tracting the $3,000,000 already advanced, would leave an amount of $7,000,000 due the carrier. We made some further adjustments in their estimate and could not see our way clear at that time to certify the full amount of $3,500,000, but certified $2,000,000 feeling that would be safe. That certificate is No. A-225, dated August 31, 1920. That application was received on August 23, 1920 for an advance of $3,500,000 and a certificate for an advance of $2,000,000 was issued on August 31, 1920.

(The certificate of August 31, 1920 was offered and received in evidence and is included herewith as page 2 of Government Exhibit 1.)

Mr. Dorety: May I interrupt just a moment? I have not made any objections so far, Your Honor, but it seems to me that all of this testimony in regard to these advances which were made under Section 209 (h) was immaterial and irrelevant in this proceeding. None of this testimony refers to the payment under section 212, which is really the question in this case.

The Court: Well I suppose Mr. Collins, that you want to make a sort of a comparison as to what the practice was under Section 209 and subsequently under Section 212?

Mr. Collins: Yes.

The Court: I think I will receive all this evidence subject to your objection as incompetent, irrelevant and immaterial.

The Commission did not choose to certify any more than might be due the carrier and, therefore, they made their certificate for a smaller amount than they thought would eventually be due the carrier on the final ascertainment of the amount due, realizing that there would necessarily be corrections, possibly both increasing and reducing the amount, or this amount estimated to be due the carrier. In other words, we felt at all times that we were not overpaying them. It was our intention to be well under the final ascertainment.

58 There was an additional certificate issued on the application of August 23, 1920. That certificate was issued as No. A-276, in the amount of $1,500,000 on November 4, 1920. That certificate brought the certification up to an

amount representing all that the carrier had applied for as advances under the guaranty.

(The certificate No. A-276 of November 4, 1920 was offered and received in evidence and is included herewith as page 3 of Government Exhibit 1).

On February 14, 1931, the defendant filed another return which was intended to cover its entire railway operating income for the entire guaranty period in accordance with the requirements outlined in the Commission's order calling for the return, and such additional items of revenue and expenses, etc. as had come into the carrier after the end of the guaranty period, that is the end of August 1920, items ordinarily called lapovers, meaning delayed items of revenue and expense, the return is more or less complete, subject, of course, to adjustment up until the Commission could make a finding, but it is for the purpose possibly of more accurate determination by the Commission, because it covers all the amounts involved in the guaranty accounts up to and including the close of the guaranty period and beyond that to about December 31, 1920, the Commission had issued an order on October 18, 1920, under which the Great Northern Railway Company filed this return of February 14, 1921. The form of this order followed the circulars previously issued by the Commission for earlier returns but required more detailed information.

(The order of October 18, 1920 was offered and received in evidence and is included herewith as Government Exhibit 2.)

The Commission finally required the close of the guaranty period accounts as of December 31, 1921. The books were kept open until that time and were still open when this return of February 14, 1921 was filed. The books were
59 not closed for some 10 months after that. The reason for it was to get all the items of revenue and expense in the guaranty period accounts that properly belonged there and for lapovers.

The total amount claimed by the defendant in its return of February 14, 1921, was $18,498,391.67, of which $6,500,000 had already been received by the carrier through previous advances, leaving the balance due the carrier as claimed of $11,998,391.67. That is supported by the details under various sheets or series of sheets included in the return at pages 31 to 37, inclusive. The return of February 14, 1921 is comparable with the carrier's previous claim in that it

involves the same accounts, the same items of revenues and expenses. On page 30 of Exhibit 1 is this statement by the carrier: "The schedules following are, as near as can be determined at this time, a basis for settlement under Section 209, Transportation Act 1920." The amounts that were included in the carrier's books were subject to adjustments. In one of the columns on the sheets, there were adjustments in very [sizeable] amounts that are referred to in the second paragraph on page 30. The total amounts that would be involved in these accounts were not determinable at the time this schedule was filed and the carrier, under instructions in the order, estimated those amounts, and this return is estimated to the extent of the carrier's conception of undeterminable items, and such undeterminable amounts as the carrier thought should be included in the claim are set forth under the column headed "Adjustments". These amounts are over and above the amounts appearing on the carrier's books, to the extent of an amount equal to necessary reserves.

The total amount shown in these sheets 31 to 37, represents the result of the carrier's operations for the guaranty period as adjusted for such amounts as mentioned, which when carried down to the total at the end will show net railway operating deficit of $3,655,833.67, and that figure
60 would be comparable with previous estimates that have been made by the carrier as an item or as an account. The carrier in its first estimate concluded that its railway operating income would be $7,567,924.00. In its second estimate it concluded that it would be $3,906,588.00, but upon the return of the final figures, after the accounts were audited, it was found that they had a deficit of $3,655,834.00. The return of February 14th was filed as covering all items that were included in the carrier's books up to and including the close of business for August, except that the books were continued open in order to get everything into the guaranty period that properly belonged there under the law. By adding the amount of the carrier's claim for compensation of $14,842,558.00 to the deficit of $3,655,833.67 referred to for the guaranty period, the result is a claim against the government for $18,498,391.67. This return filed February 14, 1921, was supplemented by various schedules. It is a rather voluminous return and covered not only the adjustments mentioned but gave the formula for the determination of the maintenance that the Commission was assumed under the law to fix. That was referred to as the Railway Executives formula. They had the matter under study practically since the beginning of the guaranty period and finally pro-

mulgated a sort of accounting form where figures could be set down for the various classes of labor and material during the test period; then certain similar figures were being made for the guaranty period, and by determining the difference between the two, it would give what it called an equation figure for the different items; and it also attempted to determine the difference in cost of maintenance on account of the different amount of property operated. That is, the amount of property used during the test period as compared with the amount used during the guaranty period. This data in the return of February 14th was set up by the
61 carrier on such a formula as that which gave the amount of the maintenance which the carrier found, under that sort of calculation, as being their maintenance.

Directly after the return of February 14th was filed, the Commission had an application from the carrier for further payment of $6,000,000. It stated in that application that it desired this certificate for credit purposes only. That was stated for the reason primarily, that the Commission could not under the law certify any further advances unless application had been made for the advances during the guaranty period; that is to say, had an application been made to the Commission before the end of August, 1920, the Commission could have continued to have acted on that application in its certification of further advances, but inasmuch as all the money had been advanced to the carrier that it had applied for during the guaranty period, this application appeared to be out of order, that is, there was no law that would permit the Commission to make a further certification of advances. There was no provision for any partial payment at that time. The carrier was very greatly in need of money, the same as many others, and were trying to find some way by which the Commission could make a certification and give them the money. If they could get a certification from the Commission, that they could use as collateral to obtain a loan under favorable conditions to meet these very special obligations and needs of the carrier, and the Commission desiring to be helpful was willing to work with the carrier, to try to do what it could for it, if there was anything further it could do pending the final finding in the case. The Commission at that time realized that it would be a long dragged out process in making the final determination of the amount due this carrier and others under the guaranty. It would be necessary to examine the carrier's books of account; it would be necessary to go into quite an elaborate analysis of
62 the details in the case; it would be necessary for the Commission to determine certain principles that had

not as yet been determined, but which were under consideration at that time. I might mention a few of the difficulties; we have already referred to the Railway Executives' formula of fixing maintenance. The Railway Executives' association recommended to the Commission that it adopt that formula. The Commission was not in a position to decide at that time just how it would fix the maintenance. It gave the carriers all the opportunity that they chose to have to consult with the Bureau officials, with the individual members of the Commission, and with the Bureau heads and there were various consultations between the Commission people themselves to assist in determining how the Commission would fix the maintenance, that is, the principles that would be involved. The carriers contended among other things that certain features should be considered, the item of salvage, wages in the way of work on a piece work basis, straight wages per hour. The Commission rendered its decision on August 15, 1923, In the Matter of Treatment of Salvage, Piece Work and Prices, in settlements under Section 209, Transportation Act, 1920, which decision is reported at 82 ICC 678. The Commission's syllabus of this decision is as follows:

"Upon consideration of the record, Held, That in the determination of proper general, or composite, factors to be applied to test-period charges in fixing the amounts which shall not be exceeded in charges to operating expenses for maintenance in the guaranty period, under the provisions of section 209 of the transportation act, 1920, the use of separate factors for new and scrap materials and the recognition of changes in the proportion of piece work represented in wages paid is impracticable under existing circumstances and is unnecessary to substantial justice; also, that in determining the difference in cost of material during the guaranty period as compared with the test period, actual cost of the material applied, as shown by the accounts kept in accordance with our classifications, should be used."

63 On July 12, 1921, the Commission rendered its decision In the Matter of Maintenance Expenses under Section 209, which is reported at 70 ICC 115, and which prescribes the method to be followed in determining the amount of maintenance to be included in operating expenses of the carriers under the guaranty of Section 209, the syllabus of which decision is as follows:

"1. In fixing the maximum amount to be included in operating expenses for maintenance under the guaranty of

section 209 of the transportation act, 1920, the Commission will, in applying the rule set forth in the proviso of paragraph (a) of section 5 of the "standard contract" between the United States and the carriers, use as the basic measure the expenditure for maintenance during an average six months of the test period, adjusted to differences in the cost of labor and materials and in the amount and use of the property, in accordance with the provisions of paragraph (c). Held, that differences in the "cost of labor", as those words are used in said paragraph (c), do not include changes in the quality or effectiveness of labor, but only changes in wages.

2. In fixing the maximum amount to be included in operating expenses for maintenance under said guaranty, the Commission will compute charges representing depreciations and retirements upon the same bases as those which were used during an average six months of the test period."

On December 15, 1921, the Commission reached some further and more definite conclusions as to what should be involved in the settlement under the guaranty in Finance Docket No. 1606 entitled, In the Matter of Final Settlement under Section 209 of the Transportation Act 1920, which is reported at 70 ICC 711. The syllabus of this decision is as follows:

"1. December 31, 1921, is fixed as the date as of which all accounts pertaining to the guaranty period shall be considered closed for the purpose of computing the guaranty.

2. All carriers which accepted the provisions of section 209 of the transportation act, 1920, are required to file on or before March 1, 1922, final statements of amounts due to them or to the United States thereunder. Forms for rendition of statements prescribed.

3. In the computation of railway operating income or any deficit therein for the guaranty period for the purposes of section 209 of the transportation act, 1920, the provisions of subdivision (f) of the section are provisions limiting the inclusion in guaranty computation of charges to operating expenses or revenues actually entered on the carrier's
64 books of account under the accounting rules of the Commission and do not contemplate any increase of or addition to such charges for the purposes of the guaranty settlement.

4. For the purpose of the guaranty, charges to operating expenses for maintenance will be limited to those applying

to work done between March 1 and August 31, 1920, inclusive, and to charges accrued or equalized in accordance with the Commission's accounting rules. No charges for deferred maintenance will be considered.

5. Estimates of the net effect of deferred debit and credit items made by the Commission and agreed to by carriers under the authority of paragraph (b) of section 212 will be considered in computing the guaranty.

6. Announcement of general rule for adjustment of differences in cost of labor and material in establishing the maximum amounts to be included in operating expenses for maintenance of way and structures and for maintenance of equipment for the purposes of the guaranty.

7. Methods of adjustment for differences in amount and use of property separately indicated for maintenance of way and structures and for maintenance of equipment."

After those decisions were reached, it was much easier for us to determine what to do. All of these decisions you will appreciate were issued quite a considerable time after this return that we are now discussing filed by the carrier February 14, 1921, was received by the Commission. On February 16th the carrier made application for a further certification. The Commission being desirous of assisting the carrier in any way similar to the issuance of certificates for advances, took the application under advisement and we were instructed to make a calculation along the same lines that we calculated for the previous advances to the carrier, to see what the result would be in connection with this final return, that is, final return as it was considered at that time—to see what if anything further the Commission would be justified in certifying prior to its final determination. That may have been done partly for the reason that the so-called Winslow Bill was up in Congress then, and there was the thought prevailing in the Commission and among the carriers, that some sort of a provision would be passed to
65 enable the Commission to make further certifications, it being realized that a carrier that unfortunately happened to put in no application for advances between the first day of March and the last day of August, would really be entitled to payment of funds, as much as the carrier that happened to be situated so fortunately that they did happen to have an application before the Commission. The purpose of the bill was to try to correct that inequity; not inequity in the final determination, but inequity in not being able to get the funds. The Government apparently owed the car-

riers vast sums of money. If there was no application for it that had been filed before the last of August, the Commission could not certify that as advances. The Great Northern Railway Company was so unfortunately situated that it did not have an application before the Commission for anything beyond what had already been certified before. Therefore, in casting around for a way to obtain some additional funds, to meet their very pressing and urgent needs, the thought came to somebody that if the Commission could make a certification, or even though it was not within the law in the sense that it could be cashed at the Treasury Department, that the certificate within itself would be sufficient evidence to justify some of the banking interests in making the carrier a loan; so they asked that they be given a certification for this $6,000,000.00, not with the expectation of getting the money from the United States Treasury, because it was realized that there was no law under which the Treasury Department could pay it, but that they would use it at the banks as collateral pending the final determination of the amount that would be due them under the guaranty by the Commission; so we were asked to make an analysis for that purpose, and these principles that were under discussion by the Commission and unsettled—in view of that unsettled state of affairs we proceeded in a manner exactly the same as we did under the ordinary partial pay-
66 ments and made up the calculations in exactly the same way. It was a pure and simple estimate on our part. No part of it whatsoever had any intent of finality. As a matter of fact, the calculation that we made was just the same as we made on advances, but when the certificate was made it read, "in partial payment"—as a partial payment for credit purposes only. Whether you would call it a partial payment or advances I guess would be immaterial. It was just some money that we thought would finally be due the carrier, and we wanted to pay it to them, and there seemed to be a technicality in the law, there, and we wanted to advance them an additional $6,000,000, because we thought the Government would eventually owe them that much. In figuring this calculation, based on this return as made, in exactly the same way that we had made the calculations on the other advances, we concluded that the Government would eventually have to certify under the guaranty, an amount sufficient to justify the payment of $6,000,000 at this time. It looked on the face of the returns that there might be some considerable amount—to be exact, the calculation that we made would indicate that there might eventually be due the carrier under the guaranty approxi-

mately $15,000,000. They had already received $6,500,000, and this additional $6,000,000 would make $12,500,000 altogether. That would leave some $2,500,000 as a margin for adjustments. The Commission did not know, the carriers did not know, and there was nobody that knew at that time what the Commission would decide as to these matters that are covered by these decisions that have just been cited. The certificate for $6,000,000 was issued on February 23, 1921.

(The certificate of February 23, 1921, was offered and received in evidence and is included herewith as page 4 of Government Exhibit 1.)

67 As previously stated, the carrier's return was received on February 14th. They made application for this certificate for advance on February 16th. The certificate was issued after a very perfunctory examination of the return and calculation on February 23rd, for $6,000,000, with the understanding that it was for credit purposes. The Commission submitted that certificate to the Treasury Department on February 23rd, the day it was issued, in which the Commission says to the Secretary of the Treasury; "You are advised that the Great Northern Railway Company is in urgent need of financial assistance and in order to meet its current obligations the company has applied for a partial payment under the guaranty provided under section 209 of the Transportation Act, 1920, intending, as we are advised, to use the Commission's certificate as a basis of credit with the bankers.

"In view of these circumstances we have issued and are forwarding to you, through the regular channels, a certificate for partial payment in favor of the Great Northern Railway Company, such as has already been issued in favor of the Grand Trunk Western and other companies. It is our understanding that the certificate issued in favor of the Great Northern Railway Company is not requested for the purpose of making a test of the law as was the case in respect of the certificate issued in favor of the Grand Trunk Western, but that the present certificate, is desired purely for use as the basis of credit with this company's bankers."

The Secretary of the Treasury immediately notified the Commission that he could not under the law honor that certificate by the payment of cash on it, or countenance it, so the Commission then, in a further attempt to help out the Great Northern Railway Company, seemed to have partly lost sight of the purpose of that certificate. Anyhow, the

Commission was notified on the 24th or 25th of February,
that the Secretary of the Treasury would not honor
68 it. Then on the 26th of February, 1921, this Section
212 became law, and the conclusion was reached then that "here is a solution to it. We will not have to take this certificate or a copy of it and go to a bank and borrow this money, but if you willing to change it and use language that will indicate that you have made this finding under paragraph 212 of the Transportation Act, or under paragraph G, of the Transportation Act, as modified by Section 212, then we can take it right straight to the Treasury and get our $6,000,000," so the Commission then decided that it would be safe in doing that, and on the first day of March, 1921, it issued a supplementary certificate number A-328-B, set forth on page 46. That was submitted to the Secretary of the Treasury, cancelling the certificate that we had just had under discussion, and at the same time it issued a certificate in another form, and called it number A-329 of March 1st.

(The certificate No. A-329, dated March 1, 1921 was offered and received in evidence and is included herewith as page 5 of Government Exhibit 1.)

Between the issuance of the credit certificate on February 23, 1921 and the issuance of this certificate No. A-329 of March 1, 1921, the Commission made no further analyses, no further investigations, no further calculations. The Commission had not decided anything. There was absolutely nothing done. They just simply changed the form of the certificate in order to accommodate the railroad. That was all pending the final determination of the amount that would finally be determined to be due the carrier. Nobody had any thought at the time that that certificate had any finality to it. About the time that that bill passed, and quite for the next several days there was considerable discussion around the Commission as to just what should be done and how we should do it, in regard to the issuance of certificates on the
basis of Section 212, but this was issued before any
69 conclusions were reached as to what we should do, or
what Section 212 meant. We had not entirely got our bearings as to the effect of Section 212 or the effect of the certificates that might be issued under Section 212. On the first day of March which you will observe was only three days after the bill became law, and by the time it had been circulated among us, it was quite several days after that, so we really hardly knew what the situation was at that time. We just about knew that it was passed and that it was a law that was in effect, but our people that were in touch

with the Congressional committees had seen advance copies of it, but it was not circulated generally around the force and was not familiar to those of the Commission that were to be affected by these things. The certificate issued to the Great Northern here was just simply number 328 with the language revised to conform as we thought to the requirements of the Treasury Department, so that it would be agreeable to the phraseology of Section 212, to enable this railroad to get this $6,000,000 that we had certified and the Treasury Department had turned down.

The witness then referred to and produced a number of communications, being letters exchanged between the defendant and the Interstate Commerce Commission, which, plaintiff's counsel stated, were brought in evidence for the purpose of showing the pressure under which the Commission's forces worked in examining the data submitted in defendant's return of February 14, 1921, and to show further that after that return was filed, and up until 1925, the defendant was constantly revising, correcting and changing the data submitted with that return.

The first three letters referred to were addressed to W. A. Colston, Director, Bureau of Finance, Interstate Com-
70 merce Commission, by defendant's president and were dated February 16, 1921, February 25, 1921 and February 28, 1921, respectively.

(Said letters were offered and received in evidence and are included herewith as pages 6, 7 and 8 of Government Exhibit 1.)

The witness stated that the letter of February 16th was defendant's application for an advance of $6,000,000 on the amount of the guaranty; that the letter of February 25th requested final settlement as promptly as practicable; and that the letter of February 28th requested a new certificate for $6,000,000 in lieu of the certificate issued by the Commission February 23rd as No. A-328.

That on March 26, 1921, defendant asked for further partial payment and with letters of that date submitted some additional and revised information to be substituted for data submitted with the return of February 14, 1921; and that the Commission declined to certify further partial payments. That by letter dated March 21st, 1922 the defendant requested the Commission for an additional extension of time until April 30, 1922, in which to file returns of data required under the Commission's decision in its Finance Docket 1606, pertaining to final settlements under Section 209.

That the Commission issued an order requiring the carriers to close their books for the guaranty period as of December 31, 1921, and to file a final return in the form prescribed by the Commission. That form was much more elaborate and in much more detail than the requirement for previous returns. It followed to some extent along the lines of the order of October 18, 1920, but it outlined in very great and voluminous detail the data that must be submitted to the Commission, the adjustments that must be made, etc. That final return was filed by the carrier on July 3, 1922, and
71 after analyzing it in very great detail and getting the result of the examination of the defendant's accounts by the Commission's Bureau of Accounts, and verifying the data submitted by the defendant in the return along with a vast amount of data that was submitted immediately following, the Commission finally reached its conclusions which are expressed in its decision of June 17, 1925, appearing in 99 I. C. C. 231, in which it determined that the amount due the carrier under the guaranty was $11,178,887.31 and that amount was the only definite finding that the Commission had made up to that time. However, there was a correction later made in that amount, the carrier was not satisfied with that finding and at its request, the Commission reopened and reheard certain findings of the case after which it rendered its decision, making some corrections, one of which involved approximately $90,000, which decision was rendered June 8, 1926 and appears in 111 ICC 318.

(The Commission's decisions of June 17, 1925 and June 8, 1926, were offered and received in evidence and are included herewith as Government Exhibits 6 and 7, respectively.)

The defendant's return filed July 3, 1922, was headed "Request for final settlement". That was a complete return in itself without regard to previous returns in any way. In that return the defendant claimed the amount due from the Government was $17,599,956.42. The main difference between that return and the one of February 14, 1921, was in the railway operating income. In the return of February 14th, the carrier showed a deficit of $3,655,834.00 and in the return of July 3, 1922, it showed a deficit of $2,646,876.00. Neither of these amounts shown as deficits, however, necessarily represents the actual result of operations. Both of them were adjusted by the carrier in certain respects and the carrier reduced the amount claimed from the Government to
72 the extent of over a million dollars. The final return of July 3, 1922, contains a statement of the carrier's income, comparable to those previous mentioned, the revenues, expenses and other items involved in the guaranty for

the six months March to August, 1920, including all delayed items showed that they were audited into the accounts or put into the accounts from September 1920 to December 1921, inclusive. There were some eliminations in accordance with the Commission's decisions, one of which involved $814,-510.64, and there were some other adjustments, but when it was all resolved into a finality, the defendant claimed there was still due them something over $5,000,000. That the defendant's request for final settlement filed with the Commission July 3, 1922, was submitted by letter from defendant's comptroller, dated June 13, 1922, with which was submitted final return already mentioned.

(Said letter dated June 13, 1922, was offered and received in evidence and is included herewith as page 9 of Government Exhibit 1.)

That by letter dated July 3, 1923, defendant's comptroller requested the Commission to accept certain of defendant's revised exhibits showing condition of "operating reserves" in lieu of data previously furnished. That by letter dated September 10, 1923, defendant's comptroller submitted to the Commission revised exhibit covering corrections of statements contained in its return filed July 3, 1922 and stating that a supplemental claim would be submitted subsequently on account of two amounts $162,430.80 and $36,912.47, respectively, which were involved in the Director General's accounts with the carrier. That by letter dated September 19, 1923, defendant's comptroller requested the Commission to postpone final action on defendant's equation factor until defendant could complete and furnish additional data. That by letter dated January 15, 1924, defendant's comp-

73 troller requested the Commission for a conference upon advice that the Commission's computations at that time disclosed an overpayment to defendant of $1,603,304.36, defendant requesting conference with view of reaching an agreement as to items in controversy; and that by letter dated January 19, 1924, the Director of the Commission's Bureau of Finance granted the requested conference; that with letter dated September 30, 1924, defendant's comptroller submitted to the Commission revised data pertaining to defendant's claim, the data covering claim for increase in property and use, for additional allowance on account of maintenance on newly constructed lines, additional allowance on account of reduction in the effective working day and for additional allowance on account of car liners purchased near end of guaranty period, cost of which was eliminated by Bureau of Accounts. That on December 26, 1924, defendant filed with the Commission its "claims for additional compen-

sation provided for in Section 4 of the Federal Control Act", in the amount of $464,829.21, and resulted in changes in data previously submitted. That by letter dated January 30, 1925 defendant's comptroller submitted to the Commission revised statement of certain data previously furnished with its final return, covering adjustments for difference in use of property, etc.

That on June 17, 1925, the Commission issued its certificate No. A-1041, stating that it had made final determination of the amount of the guaranty due defendant and found said amount to be $11,178,887.31; and that on June 8, 1926, the Commission issued its amended certificate No. A-1041, stating that the amount of the guaranty due defendant had been found to be $11,170,214.02.

(Said certificate No. A-1041 and amended certificate No. A-1041, were offered and received and were included herewith as pages 10 and 11 of Government Exhibit 1.)

74 That the certificate of June 8, 1926 corrected the certificate of June 17, 1925 by excluding an amount of $98,000 which had been erroneously included in the guaranty period instead of in the Federal Control period.

That preceding the issuance of its certificate of June 17, 1925, the Commission made a very thorough and painstaking investigation and verification of the items entering into the amount supposed to be due the carrier under the guaranty. It checked all the amounts back as far as practicable with the annual reports and monthly reports; and made comparisons with the volume of traffic that was hauled, trains and train miles, capacity and capacity miles, length of road, mileage, amount of expenses and revenue per mile and various other things. That the Commission had never done anything like that at all in connection with the issuance of certificates for advances for partial payment. That the Commission's Bureau of Accounts had made an examination of defendant's books previous to issuance of the certificate of June 17, 1925 but had not made such examination prior to issuance of certificates for advances or partial payments. That the examination of defendant's books looking to issuance of the certificate dated June 17, 1925 was made in 1923 and when completed, a reduction of $510,907.56 in the deficit reported by defendant was shown. The examination of defendant's accounts was made to determine the accuracy of the amounts entered in the books, first to see that they had complied with the Commission's accounting classification and to see further that no entries had been made in the guaranty accounts that

properly belonged in the corporate or other accounts and that no entries had been made in other accounts that properly belonged in the guaranty accounts. The accountants took exception to 11 items found entered in the carrier's
75 books in the amount of $449,936.83, the effect of which would be to reduce the amount due the carrier under the guaranty to that extent. The accountants' exceptions were the subject of discussion between the Commission and the carrier and were finally reduced to $351,492.35 on January 9, 1926.

The witness stated that the deductions made by the Commission from the defendant's claim under the guaranty were set forth and shown in its report of June 17, 1925, 99 ICC 232, and that each deduction was there explained, the total deductions amounting to $5,316,081.07, which left the amount necessary to make good the guaranty as less than the amount already certified by the Commission and left the carrier indebted to the Government. The witness produced a statement setting out in comparison, figures from the different returns previously discussed and filed by the carrier.

(Said statement was offered and received in evidence and is included herewith as Government Exhibit 8).

The witness produced a further statement showing in a comparative way, the figures drawn from the several returns filed by the defendant and showing further the deductions made by the Commission before issuing its certificate of March 1, 1921, for $6,000,000 as partial payment on the defendant's claim and the items disallowed by the Commission before making that certificate.

(Said statement was offered and received in evidence and is included herewith as Government Exhibit 9.)

That the amount of $18,498,000 about five lines down in the middle of this statement is the amount of the carrier's claim in its February 4, 1921 return and that the figure of $15,705,000 at the middle of the bottom of the statement is the amount that was left after the Commission had made deductions from the carrier's claims and that the
76 statement is tendered for the purpose of showing those deductions were in comparison with the Commission's findings made when it found the amount necessary to make good the guaranty. The statement does show that that $15,705,688 was an estimated amount; in other words, we estimated that that amount would be necessary to make good the guaranty and that estimate was made on basis of this

superficial examination, and these deductions, which are more or less obvious.

The carrier reduced its claim first from $18,498,000 down to $16,387,000.

Before the statement referred to was received in evidence, counsel for defendant made the following statement:

"Well, if the Court please, I haven't any objection to these figures going in, but I have to some of the language and descriptions. For instance, the description of this amount as an estimated amount, rather than a definitely determined amount, is a conclusion of the witness. The total amount claimed by the carrier is also a more or less conclusion of the witness. We never reduced our claim except as we were compelled to eliminate certain items or change our claim by order of the Commission. With that explanation and with that objection I am willing to leave the figures go in, but I do not want to be bound by the descriptive terms that the witness has used in describing them to us."

Cross-Examination (By Mr. Dorety)

That in 1921, the Commission consisted of 11 members, divided into divisions consisting of three or four commissioners, each having charge of certain work and the authority of the Commission. Division 4 had charge of guaranty period settlements. That the Commission also had several bureaus including the Bureau of Finance of which W. A. Colston was the director in charge with G. I. Bunting, Assistant Director in charge of what was called the Section of Accounts and Statistics, and S. S. Roberts as Assistant Director of the Engineering Section. There were some other assistant directors, but those two were about the only ones that had anything to do with the guaranty. The witness stated that he was examiner in charge in the Section
77 of Accounts immediately under Mr. Bunting; that he reported to Mr. Bunting; that Mr. Bunting reported to Mr. Colston, who reported to Division 4. That in the latter part of 1920 and early 1921, the Bureau had possibly 40 people working on the guaranty period matters. That it had few employes in the beginning but increased its force so that at some time in its existence, it might have had 100 employes, but not that many working on guaranty matters. That section 209, Transportation Act 1920, provides in paragraph (c) (1) that the guaranty shall be one-half the annual

compensation during Federal Control including increases in such compensation provided for in Section 4 of Federal Control Act and that one of the Commission's functions was to determine what those increases in compensation were and that additional compensation that was provided for in the Federal Control Act was an annual rate of interest on the cost of additions and betterments made during Federal Control with the approval of the president. That the Commission was to determine what additional property went into the plant and to allow a return on that in addition to the Federal Control compensation. That this guaranty being to the effect that the railway operating income of the carrier should be a certain amount, it was incumbent on the Commission first to determine what the railway operating income was during the guaranty period, and if it did not measure up to this amount, to pay the carrier an amount representing the difference. Generally speaking that would be the guaranty to the carrier. That if the time of the examiners working on guaranty matters were classified and apportioned to different items considered in connection with guaranty claims. it might be true that more than half their entire time was spent in considering what amount should be allowed the carriers for maintenance of way and structures or for maintenance of equipment during the guaranty period. Generally speaking, it might be said that the way in which the Com-

78 mission undertook to make an allowance to carriers for maintenance expenses during the guaranty period was by starting with an average six months maintenance expense during the test period, and making adjustments to allow for increase or change in wages, price of material, amount of property maintained and the use of the property maintained. So that if a carrier spent a million dollars in six months of the test period and the Commission found that wages and prices of material had doubled, one step it would take would be to double that million dollars so as to allow for increase in prices; and if the carrier had $100,000,000 worth of property in the test period and $150,000,000 worth of property to maintain in the guaranty period, the Commission would allow something more than the test period expense in order to enable them to maintain that additional property, but a distinction is made between additional property and change in valuations of the same property. That if the Commission found that in the test period a given railroad carried a certain amount of traffic, and during the guaranty period the same railroad carried more traffic, the Commission would assume that it would cost somewhat more

to maintain and would allow a little additional amount for difference in [useage] assuming there was more [useage] in the guaranty period than in the test period, but there would be a deduction if the [useage] was less. That the same was true as to equipment including freight cars, locomotives. The witness stated that he was not qualified to say whether the Commission made an allowance for change in intensity of use of equipment but that he knew some calculations on it were made.

That the Commission's order of October 18, 1920 (Government exhibit 2) calls for certain information not only as to the carrier's maintenance expense during the test period and during the guaranty period, but also as to the amount of property maintained and the intensity of use of the
79 property, and for the carrier's estimate as to increases due to increased wages or increases in price of material; and that in the defendant's return of February 14, 1921, it included its own data or some data on all those subjects

"At this time counsel for defendant offered a complete copy of defendant's return of February 14, 1921, which was received in evidence as defendant's Exhibit A, but which because of its bulk, is not included herewith. Exhibit A was a book of 119 pages of tables and statistical matter containing the information called for by the Commission's order of October 18, 1920 (Exhibit 2 in this case), and made up in the form specified on pages 2-17, inclusive of Exhibit 2. The first 3 pages contained answers to the questions set forth on pages 2 and 3 of Exhibit 2. The next 7 pages contained the information called for in Schedule A on page 4 of Exhibit 2, divided into 541 primary accounts. The next 7 pages contained the information called for in Schedule B on page 6 of Exhibit 2, divided into the same primary accounts. The next 7 pages contained the information called for in Schedule C on page 7 of Exhibit 2, divided into the same primary accounts. The next 2 pages were filed in accordance with requirements for Schedules C-1 and C-2 on page 8 of Exhibit 2.

The next 37 pages contained information prepared in accordance with the requirements for Schedule C-3 on page 8 of Exhibit 2, giving details and computations for the amounts claimed for maintenance of way and structures and maintenance of equipment in Column J of Schedule C. The next 2 pages included the information called for in Schedules C-4 and C-5 on page 9 of Exhibit 2. The next 4 pages contained the information called for in Schedule C-6 on page 9 of Ex-

hibit 2. The next 4 pages contained the information called for in Schedule C-7 on pages 9 and 10 of Exhibit 2. The next 7 pages contained the information called for on Schedule C-8 of Exhibit 2. The next 4 pages contained the information called for in Schedule C-9 on page 10 of Exhibit 2. The next page contained the information called for in Schedule C-10 of Exhibit 2. The following page contained the information called for in Schedule C-11 on page 11 of Exhibit 2. The next 7 pages contained the information called for in Schedule D on page 11 of Exhibit 2 divided into 541 primary accounts. The next page contained the information called for in Schedule E on pages 11 and 12 of Exhibit 2. The next page contained the information called for in Schedule F on page 13 of Exhibit 2. The next 4 pages contained the information called for in Schedule G on pages 14-17, inclusive of Exhibit 2. This was followed by 4 pages containing verifications by the defendant and its subsidiary companies as required by the order of the Commission and the following 4 pages contained resolutions by the directors of the defendant and its subsidiary companies authorizing the filing of the claim. The next 4 pages contained the general balance sheet statement of the defendant as of the close of business February 29th and August 31, 1920, under the heading 'Schedule H'. The next 7 pages contained detailed items of sub-accounts under certain accounts in said general balance sheet under the heading 'Schedules H-1 to H-7, inclusive.' The balance of Exhibit A consisted of similar general balance sheets of subsidiary companies of the defendant and similar sub-accounts."

80 That it is true that in this return Defendant's Exhibit A, the carrier did set forth among other things its claimed maintenance expenses for both right of way and equipment for an average six months of the test period, that it did show its claim for increases in wages and prices of material, supported by data showing various rates of wages and prices of various materials in both periods; that it did develop what is called an equation [favtor], something like 2.57, contending that its average prices for the test period compared to the guaranty period had increased 2.57 times; that it also submitted data showing the increase in its investment, or purporting to show it, and purporting to show the increase in the amount of property maintained, both road and equipment, and purporting also to show the increase in the intensity of use of both road and equipment. There is data put in by the carrier on all of those subjects in this Defendant's Exhibit A. That it was as a

result of starting with its claimed six months' test period expense, and applying the equation factor for increase in wages and materials, and applying another developed factor for increase in property and increase in intensity of use, that it reached the final amount of its claim of $18,000,000. That it would be more accurate to say that it was by that method that it developed its claimed amounts for maintenance expense in the guaranty period, than by substituting this allowance which it claimed the Commission ought to make for its actual expenses.

(Whereupon the court announced recess until the following morning at 9:30.)

81

St. Paul, Minnesota,
June 23, 1931,
9:30 o'clock A. M.

All parties being present as aforesaid, pursuant to adjournment, further proceedings were had at the above time and place as follows:

MORTON T. MAY, a witness previously called and sworn on behalf of the Government recalled by the defendant for further cross-examination testified as follows:

Cross-Examination

By Mr. Dorety (continued):

That after this return of February 14, 1921, defendant's Exhibit A, was filed, the Commission's representatives and representatives of the Great Northern Railway had conferences that were quite continuous all day every day from the time the return was filed on February 14th until the Commission's certificate was issued on February 23rd; and during those conferences, the Commission checked over with Great Northern representatives, the figures shown in the return. The witness did not say that the figures were checked over "quite fully" but that they were given as much attention as seemed practicable under the circumstances. The conferences were not necessarily in the nature of drawing several members of the Bureau together but were largely between individuals of the Bureau with individual officers of the defendant; they were more in the nature of an examiner conferring with an officer of the defendant company in relation to some specific item that he wanted to make inquiry about, the purpose being to save

him the necessity of taking the time for investigating the item. There were several representatives of the Bureau both of the accounting and engineering sections engaged in conferences with different representatives of the defendant during the working or weekdays between February 14th and 23rd, approximately 8 or 9 days, and they
82 checked the return as fully as was practicable in that limited time with the facilities at hand and under the conditions under which they were working.

That when previous applications for advances under Section 209 (h) were made in June and August, there had been conferences somewhat similar, although not so protracted, but there were conferences more or less continuously, although in the first advance, it may be that the defendant was not so well represented as on the second and third, but as the witness recalled it, there were conferences from time to time with individual officers of the defendant almost throughout the guaranty period. As to whether the defendant filed with its applications for advances under Section 209 (h), returns that were simply extracts from records of actual test period expenses and actual guaranty period expenses, and whether those returns contained claims for adjustment of maintenance expenses, increased prices, property or use of property, the witness stated that the returns furnished by defendant in the first instance represented amounts of revenue and expenses and that defendant gave the Commission actual book figures for the two months March and April, and made an estimate for the subsequent four months May, June, July and August and summed them together and got the totals for six months which, as the witness understood, represented what defendant anticipated would be the result of its operations for that six months. That in defendant's second application, it gave the Commission similar figures made up in the same manner except that had the result of operation entered on its books for four months and its operations for the last two months July and August only were estimated. As to whether in making those returns for advances under paragraph (h), the defendant submitted any data at all showing increases in unit prices of material or increases in wages in property maintained or in intensity of use of property,
83 the witness stated that there was considerable discussion about those matters as to whether the defendant actually filed something in the way of an exhibit. At the time of the advances, the Commission had made no attempt to calculate a factor for the defendant to represent increase in prices of material. But that it did concede that

there had been increases in the cost of maintenance as well as other items and thought at that time that the increases would certainly be represented by a factor in excess of 2; but did not attempt to determine exactly what that factor would be either for the Great Northern or for the group of carriers in which it lay. That the same was true as to increases in amount of property maintained and increase in intensity of use but the witness recalled that the defendant made mention of these matters in connection with the advances, but indicated it was not prepared at that time to make any claim with respect to them. As to whether, when those advances were made, the discussion, if there was any, on those questions of increases in property, use and price was very limited as compared with what it was when the Commission made the partial payment for $6,000,000, the witness stated that the Commission had much more complete information in that respect when defendant filed its return of February 14, 1921, than it had filed previous to that time. As to whether defendant's return of February 14, 1921 contained several times the amount of data submitted in the returns filed for advances, the witness stated that the return of February 14th was much more elaborate, in much greater detail and much more complete. As to whether the conferences concerning the advances under paragraph (h) were limited to approximately [a] hour as compared with six or seven days when the $6,000,000 certificate was made, the witness stated that that would not be a fair comparison and that the conferences were extended as long as it seemed necessary
84 in each case to obtain an explanation of certain items that the Commission did not understand. As to whether, in making the $6,000,000 certificate, the Commission discussed quite fully with defendant's representatives their claim for an allowance for maintenance expense as provided for in paragraph 5 of the Federal Control contract and whether the Commission did make certain deductions from the carrier's total claim for such allowance, the witness stated that the Commission's representatives conferred with those of defendant to the extent that it was practicable to do so in that short period of time but that he would not dignify those conferences to say that they were full "for the reason that this matter would essentially take a longer time but that the conferences were probably more full than were those previously in connection with advances." At any rate, the allowance that should be made for maintenance during the guaranty period, by starting with test period maintenance expenses and equations, was a subject discussed to some extent at those conferences, and

the Commission did consider the carrier's claim as formulated and eliminated certain portions of the claim and allowed the balance to stand, and that in fixing such amounts and in making such eliminations and allowing the balance to stand, the Commission tried to be guided by the standard contract. As to whether the Commission considered the carrier's figures on revenue and expenses with the view of determining whether any of them were disproportionate or unreasonable in the light of paragraph 5, Section 209, the witness stated that the Commission gave very little attention to that at that time and that more attention was given to it at a later date, but that it attempted to make some slight investigation of possible disproportionate or unreasonable items at that time through comparison but did not have sufficient information at hand to decide
85 specifically on those items; that it would be correct to say that the Commission attempted to comply with all the requirements of Section 209 so far as the amount of information and time available would permit, but that it did not pretend to make a final determination at that time, and tried to comply with Section 209 to the extent necessary for immediate purposes. That the Commission did faithfully and conscientiously try to follow Section 209 as fully as it could with the information and time that it had, with the full intent of going into the matter in more detail at a later date.

That the Bureau of Finance started to function in respect to claims for guaranties under Section 209 directly after March 1, 1920, or one year before the certificate for partial payment was made. That at some time during March 1920, the Bureau definitely organized for the purpose of collecting the necessary information for determining the amount of the guaranty and had probably given thought prior to March 1st to the matter of fixing maintenance allowance for the guaranty period. That the Director General was required to make allowances for increase in price, property and use and to compute such allowances for the Federal Control period and that the Director General had prepared forms in which he called upon the carriers to furnish information concerning those items in the test period and Federal Control period and that these forms were somewhat similar to that described by the Commission in its order of October 18, 1920; that these forms calling for information concerning maintenance were available to the Commission and that the Commission was considering how it would fix the maintenance for the guaranty period and in that connection naturally consideration was given to those forms

used by the Director General. That there were some conferences between representatives of the Bureau of Finance and its Director General's office for the purpose of obtaining the benefit of the Director General's experience
86 in making these computations, not specifically in connection with the Great Northern case but to obtain information to help the Commission in determining what it would do in attempting to fix maintenance and to outline the principles to be followed. In that connection, the Commission took advantage of and had the benefit of what the Director General had done. That the carriers have a standing committee called the Railway Executives Committee and some sub-committee of that organization had under advisement for quite a long period of time and promulgated a very elaborate formula which was put before the Commission for its consideration as to the method of fixing the maintenance. That formula was usually called the Railway Executive Committee formula and was submitted to the Commission some time in 1920, possibly toward the middle of the guaranty period in May or June, 1920. That the Great Northern Railway Company's claim filed February 14, 1921, was based in large part upon this formula, at least the portion of the claim relating to maintenance was so based. That so far as methods and principles of the formula were concerned, the representatives of the Commission knew what formula defendant had used in computing the charge for maintenance in its return of February 14, 1921, but the witness did not say that those representatives were thoroughly familiar with that formula which he said was complicated and difficult for him to understand. That in addition the Commission had called upon the carriers for suggestions and ideas as to methods which should be followed in determining the guaranty and had met with the adjustment committee and other carrier representatives in oral conferences practically throughout the guaranty period discussing methods and principles to be followed.

That the fact that the net railway operating income shown by the various returns which the defendant made varied from something like $7,000,000 credit in the first return of
87 June 1920 to $3,000,000 deficit in the final return of February 14, 1921 does not necessarily indicate any incorrectness in the return of February 14, 1921. That the fact is that the returns of June and August, 1920 were based in large part upon estimates, and it developed when the actual transactions were substituted for the estimates, the latter had been wide of the mark; and that was due partly

to the fact in the first estimate that defendant's wages were increased some $4,000,000 for the last four months of the guaranty period by the decision of the Labor Board. It was also true that when defendant figured its actual revenues received during the guaranty period, it found they were about $1,000,000 to $2,000,000 less than it had estimated them in the first place; and that defendant had also very much underestimated its maintenance expenses in the original returns and arrived at a very much larger figure when it prepared its final return. As to whether, in estimating its net operating income, the $7,000,000 credit instead of the $3,000,000 debit, the defendant made an estimate very much against its own interests so far as obtaining advances was concerned, the witness stated that the Commission accepted that estimate as being the best estimate that the carrier could make at the time and that it gave no consideration as to who might be hurt as a result of overestimating or underestimating the net operating income in making the advances on the returns of June and August, 1920. As to whether, if there were erroneous estimates as to defendant's guaranty period expenses in any of its returns, those errors were immaterial and had no effect one way or another upon the Commission in making the $6,000,000 certificate, for the reason that the maintenance allowance was based upon an equation of test periods and where the defendant's actual guaranty expenses were not used at all in determining the amount of the pay-
88 ment, the witness stated that might be true in a sense, but it was not the Commission's intention to allow more for maintenance than was actually expended regardless of what it might determine as being the proper charge for maintenance but that any overstatement or error that might be found in defendant's maintenance expenses would not be involved in the determination of the amount of the guaranty, that is, assuming that the amount finally fixed would not be in excess of what defendant actually expended.

That it is a fact that under the Commission's accounting rules and the carrier's practices, all cash transactions whether receipts or disbursements are promptly entered in the carrier's records; and that when a transaction occurs which may involve an expenditure, the amount of which cannot be determined, such as a personal injury or loss or damage to freight, or something of that sort, the carrier is permitted by the Commission's rules to make an estimate of the probable expenditure which it will ultimately have to make, and to include that estimate in its accounts

in the form of a reserve; and then later on when the amount of the payment is determined and payment is made, the payment is charged against the reserve; and that same thing is true of claims for overcharge or refund of revenues. That is, the carrier is permitted to make reserves to cover estimated amounts of revenue which it may have to refund. That it is also a fact that some of the cash received by the carrier during the guaranty period represented revenue that had been earned during Federal Control and for which the carrier was obliged to account to the Director General, this being a "lapover" or a delayed item. That similarly some of the expenditures made by the carrier during the guaranty period were for transactions of the Director General during Federal Control. And this was also classed as a lapover; so that when the Commission started with the
89 carrier's actual accounts for the guaranty period, it was necessary to eliminate certain revenues which belonged to the Director General and certain expenses which were paid during the guaranty period for the Director General; and the same sort of lapovers occurred at the end of the guaranty period, that is, there were revenues collected after the guaranty period which should be credited to that period, and the expenses paid after the guaranty period which should be charged to the guaranty period.

That Schedule C purported to start with the receipts and expenses for the guaranty period as shown in the first seven columns thereof, being the amounts for the six months and the column showing the totals, as cash transactions during the guaranty period; and that if there were any revenues or expenses in the guaranty period accounts properly chargeable to Federal Control, defendant would be compelled to make adjustments of them in the last two columns of Schedule C; and similarly if there were any lapovers at the end of the guaranty period, defendant should have made adjustments of them in those columns; that it is also true that whatever reserves were made for these unaudited items such as possible personal injury payments, damage to freight, etc., those also should be included in the last two columns of Schedule C as adjustments. That these columns also showed the inclusion of war taxes required by paragraph 4 and Schedule C-4 of defendant's Exhibit A indicates that such adjustments were made in Schedule C. That the first seven columns of Schedule C show defendant's actual guaranty period expenses for maintenance, and then the adjustment columns show the effect of applying these formulae to defendant's test period expenses and thus determining the maintenance allowance; and that schedule C-3

showed defendant's claimed allowance for maintenance based on equation of test period expenses. That the
90 figures developed in defendant's claimed maintenance allowances for the guaranty period in Schedule C-3 are exactly the figures shown in the adjustment columns in Schedule C for maintenance, that is, the last column of Schedule C and that the details of all these adjustments including lapovers at both ends of the guaranty period and including the amount of reserves estimated and unaudited items in defendant's accounts are all shown in schedules under Section C headed "C-1 to C-11, inclusive." That the total amount of all estimated or unaudited items which were included in defendant's accounts at the end of the guaranty period was a little over a million dollars and that up to December 1921, probably less than $200,000 of these estimated amounts still remained unaudited, so that out of the estimated items of a million dollars which appeared in the accounts at the close of the guaranty period, approximately $800,000 of the reserves had been used up in cash transactions by the end of the following year. That although the existence of these reserves or estimates in defendant's accounts had been referred to as one reason why it was difficult to make a definite ascertainment on March 1, 1920, it was true that when the Commission's final certificate was made in 1925 and the other final certificate in 1926, there were still substantial amounts of reserves in unaudited items in defendant's accounts and the Commission made some adjustments to make allowance for them at that time; so that when the Commission did make a definite ascertainment, there were unaudited items in the accounts—agreed to under Section 212, which made provision for handling such items. That another reason why the Commission could not make a definite ascertainment on March 1, 1921, was that it had not yet made a check of defendant's books, which check the accountants were requested to make in November 1922.

That in defendant's return of February 14, 1921, it claimed over $18,000,000, as shown in Government Exhibit 9, and in conferences with representatives of defendant follow-
91 ing the filing of that return, the Commission's representatives eliminated certain items from that claim which it regarded as untenable or proper for elimination. That after making all those eliminations, the amount left was estimated to be $15,705,688. As to whether that was an estimate or a mathematical calculation, the witness stated that it was a derivative of the preceding practices. As to whether after arriving at this derivative of $15,700,000, the Commission arbitrarily deducted $3,000,000 more, thus ar-

riving at a figure of approximately $12,500,000, the witness stated that the Commission made no further deduction from it, that it did not deduct $3,000,000 but that put in another way, it did leave an estimated margin of approximately $3,000,000 that looked on the face of it at that time as being an amount that the Government might later find to be due the carrier. At any rate, after the Commission made the deductions it thought should be made, there was still left this margin of $3,000,000, which was considerably in excess or more than twice as much as the total estimated or unaudited items in defendant's accounts, plus the total accounting errors finally found to exist by the Commission.

That in making eliminations from defendant's claim of $18,000,000 and reducing it to $15,000,000, defendant had included certain items referred to in the Commission's reports as ineffectiveness of labor, that is the defendant contended that the cost of labor was to be determined by taking the price per hour and multiplying it by the number of hours required to complete a given task, or in other words, that it took a given number of hours in the test period to perform a standard task, and the carriers found that in the guaranty period it would take more hours to perform the same task, and the difference between those hours was called the ineffectiveness of labor. That in defendant's return of February 14, 1921, it included an exhibit which attempted to determine the factor for increase in cost of labor by showing test period cost of making certain repairs on
92 locomotives and passenger cars and then by showing the guaranty period cost for the same kind of repairs. That the Commission probably did eliminate something from defendant's $18,000,000 claim on account of that item, but that in making the $6,000,000 certificate, the Commission probably did not give consideration to that at all; at that time, the question whether the Commission would ultimately allow for ineffectiveness of labor had not been decided by the Commission and was not decided until July 1921 or August 1923. The point is that this factor of ineffectiveness of labor was undetermined when the Commission made the $6,000,000 certificate and because it was undetermined, the Commission excluded it from the claim of $18,000,000. That in defendant's $18,000,000 claim was an amount resulting from equating its test period depreciation allowance, claiming that guaranty period depreciation should be determined by taking defendant's test period depreciation and increasing the amount to reflect the increase in prices of labor and material and the increase in the price of replacing equipment, and that the Commission ex-

cluded this item in making the $6,000,000 certificate; that whether any allowance should be made for equating depreciation charges was a question which the Commission had not determined at that time; but that the Commission did allow some depreciation but not on the basis that defendant requested, but it did not eliminate all of it but changed it. That the Commission did not decide that question until July 12, 1921, and that being an undetermined question, a deduction was made for the item. That in equating maintenance expenses of the test period in its claim, defendant had equated among other items of maintenance, payments for personal injuries and that although the witness could not recall definitely, the Commission probably would have made eliminations of such items but could not recall any adjustment in that respect in making the $6,000,000 certificate.

93 As to whether the Commission eliminated from defendant's claim for additional compensation under Section 4 of the Federal Control Act in the form of interest on additions and betterments made since the test period, certain items that defendant had expended for additions and betterments which were started before Federal Control and not completed until during Federal Control, the witness stated he was not certain but that although an elimination of some $146,000 was made, he was not sure just what it covered, but that he did not think it could possibly be an amount that would involve a sufficient sum for consideration for the purpose of this suit. That in addition to these other deductions, the Commission also deducted $26,000 for possible accounting errors.

As to whether it would be a fair statement of what the Commission did in considering defendant's return with a view to making the $6,000,000 certificate, to say that the Commission had before it for several months, the formula which defendant used in the form of the Railway Executives formula; that the Commission had considered or had been considering various methods and principles disclosed by that formula; that the Commission had not questioned the correctness of some of them but had questioned the correctness of others; that wherever defendant used a formula, the correctness of which the Commission had not questioned, the Commission allowed it to stand, but wherever defendant used a formula or method the effect of which had been questioned, the Commission excluded it even though it had not been definitely determined as improper, the witness stated that such would not be a fair statement and that the Commission

did not base its calculation for allowance of maintenance on that formula, but that it simply made these deductions and finding a residue of some $3,000,000 over and above the requested partial payment, it felt that at that time any change that could be made would come within that limit; but
94 that it was true that wherever the defendant had followed a method or principle which the Commission considered questionable, it made a deduction to cover it.

That on February 21, 1921, the Bureau of Finance submitted to Division 4 of the Commission, its recommendations in respect of the payment of $6,000,000 to defendant and that being declined by the Treasury Department, the Bureau of Finance made further recommendations to Division 4 in which the language is somewhat changed, under date of February 28th, pertaining to the same matter; the purpose of the change between February 21st and February 28th being to correct the certificate in such a way that it would conform to the provisions of Section 212 which had been passed and became effective between those dates.

(The two recommendations dated February 21st and February 28th, respectively, 1921, were offered and received in evidence as defendant's Exhibits B and C, and are included herewith.)

That in addition to the deductions already mentioned as made in reducing defendant's claim from $18,000,000 to $15,000,000, a deduction was made for retirements, that is defendant equated its test period retirements as well as its test period depreciation and the Commission eliminated both; that the Commission made some further elimination on "Amount and use in connection with maintenance"; that the Commission made a deduction in amount of property maintained of $300,000 on the theory that there should not be an allowance based on the method used by defendant's in determining that item, and that this deduction was made at the time of the partial payment and of the final determination, but that later on the Commission calculated the amount and made an allowance of a certain portion; but that so far as the return under which the $6,000,000 payment was made, defendant put in a claim for over a million dollars on account of the difference in amount of property and the Commission deducted some $370,000 from that amount, which would go into the maintenance account; that
95 the deductions made on any account are included in defendant's Exhibit C as totals but not as individual components that have been discussed.

The witness stated that he would not conclude that the Commission never did make a definite ascertainment in its final certificate of June 17, 1925 or of June 8, 1926, merely because the form in which it set up its deductions in those final settlements seemed to have followed the form in which the deductions were shown in Exhibits B and C containing recommendations for partial payment pursuant to which the certificate of March 1st was issued, and which the witness had said was not a definite ascertainment.

As to why the witness had testified that in making the final certificate of June 17, 1925; the Commission was better able to make a definite ascertainment because it had before it more complete information than it had in making the partial payment certificate on March 1, 1921, the witness stated that the Commission was receiving additional information from the defendant almost continuously and had very voluminous additional information; that after the report of the Bureau to Division 4 on which the $6,000,000 payment was based, the Commission received a rather extensive statement from defendant bearing on the factor, which statement was filed March 28, 1921, and which materially changed all this data which has been discussed and that also included certain forms used in keeping time, etc.; that the forms were in blank, reciting the crews that were in service, and showing the time books of section foremen, etc.; the Commission received different exhibits from the defendant from time to time throughout the entire period and was very much in possession of information that would be more helpful and more determinable and enable it to reach conclusions than it was when the certificate for $6,000,000 was made. As to whether
96 the Commission had a very complete set of statistical information before it in Exhibit or Schedule G of defendant's return of February 14, 1921, consisting of four pages and showing average miles of road operation, ton miles, train miles, locomotive miles, car miles, average of those per mile of road, averages of different things per locomotive mile and per freight train car mile and per passenger train car mile, etc., the witness stated that the Commission had before it in making the certificate of March 1, 1921, the exhibit mentioned but that it used it in large amount to test defendant's volume of business, the figures defendant submitted for revenues and expenses, in comparison with other figures and things of that sort, but that such exhibit did contain information and was used for determining the amount to be allowed for difference in use of property and

that the exhibit gave no information that would help determine the difference in amount of maintenance on account of property operated.

As to whether the changes made in defendant's return under Docket 1606 which were different from its return of February 14, 1921, were largely in response to the Commission's decisions previously mentioned and request by the Commission for additional information, the witness stated that that was true and that defendant's return in response to the order in Docket 1606 was prepared in the form called for and involved the same information previously supplied but adjusted in accordance with requirements of that order.

As to whether it would be fair to say that the principal respects in which the Commission's situation differed in 1925 when the final certificate was made from what it was in 1921 when the partial certificate was made, was the fact that in 1925 it had made an inspection of the carrier's books, and had additional information furnished in the 1606 return and the other items mentioned, the witness stated that in addition to those things, the Commission had expressed
97 its opinion as to these various matters, that the Bureau had knowledge of the Commission's determination with respect to fixing maintenance and the decision concerning piece work and salvage prices, and in doing the work over that long period had better knowledge of what should be done and were in better position to reach a conclusion and to recommend more independently to Division 4 than it had been when it issued the certificate for $6,000,000

Q. Well, is it not a fact that you were making final settlements with other carriers before you had all these advantages that you have just enumerated, which were used in making ours?

Mr. Collins: Well of course that is irrelevant. The question is, what did the Commission do preparatory to issuing the partial payment certificates here? We do not want to preclude anything that might be interesting or helpful to the Court in this matter, but at the same time I do not like to see the record encumbered with irrelevant matter.

(Argument of counsel.)

The Court: Well I will receive the testimony subject to Mr. Collins' objection that it is irrelevant.

The witness stated in response to the question that he had no definite recollection but that the settlements were a matter of record in the Commission's printed volumes. That on

January 29, 1921, the Commission made a final settlement with the Norfolk-Southern Railroad Company reported at 65 ICC 798, but that he was unable to recall whether the Commission's accountants had audited that carrier's books before final settlement; that, however, the settlement was consummated before any of the methods and principles decided by the Commission in the decisions previously mentioned had been finally settled; that the record in that
98 case showed that the matter of that final settlement was submitted to the Commission by the Bureau on January 3, 1921, and decided by the Commission on January 29, 1921, and that the Bureau of Finance may have considered the matter for months before submitting it to Division 4: that he could not state from memory in what respect the Commission was in better position to make a definite ascertainment as to the Norfolk-Southern than as to the Great Northern Railway Company.

That a final settlement was made by the Commission with the Chicago, Milwaukee & St. Paul Railroad without any return under Docket 1606 as shown by the Commission's report at 71 ICC 603, and that the fact that the settlement in that case was submitted November 7, 1921 showed clearly and conclusively that it could have been settled without any return under Docket 1606 and that the Commission's statement that "returns of the carrier under our orders of October 18, 1920 and January 5, 1921, together with the revised return and various supplemental statements have been examined", would indicate that it may have been settled without a 1606 return.

Q. And before the final decision of the Commission, in the matter of piece work and salvage, there had been 75 or 100 final settlements made, had there not?

Mr. Collins: I shall have to object to that unless counsel can show it, and even that attempt to show it, would be irrelevant. All the questions that the Commission had up with the Great Northern were relevant to this case only. If they wanted to go ahead and show that those cases contained the same 101 different issues and controverted points that were contained in the Great Northern matter, then we might possibly get somewhere in order to make a relevant comparison.

The Court: Well, we will let Mr. May answer that if he has any recollection.

99 Q. Isn't it true that the controverted questions which were raised on the Great Northern claim, as to the

maintenance allowance, were raised on the claim of every other carrier in the United States?

Mr. Collins: That is objected to on the ground of relevancy and immateriality.

Q. Well then I will ask whether they were raised on the settlements with all of the other carriers with whom final settlements were made in 1921 and 1922?

Mr. Collins: My objection stands to asking that question with respect to any other carriers.

The Court: Well if Mr. May knows he may answer.

Mr. Collins: Exception.

A. Those controversial questions were not involved in connection with some of the carriers, and they were certainly not involved to the extent with many of the railroads that they were with the Great Northern Railway Company, and we found in dealing with some of the railroads that they were entirely willing and agreeable to eliminating consideration of those matters. That statement is intended to be very general. I would not like to be called upon to state specific cases. I think I could find them if I had to, but as a general statement, there were many carriers that were perfectly willing to forego those controversial matters in respect of inefficiency of labor, in respect of the contentions on the difference in amount and use of property as contended for in the Railroad Executives' formula, and other matters that have been mentioned in this record. Whether they are the ones to which Mr. Dorety refers, that received the settlement before he got his partial payment, or that were settled with during the year 1921 without a return under the order in Finance Docket Number 1606 I can't say. We had the returns of many railroads that were necessary to be handled.

100 The period that has elapsed has been probably close to ten years and I certainly could not remember the dates that settlements were made with these various railroads and the contentions that may have been under consideration so far as the individual railroads are concerned, at this late date.

Mr. Collins: Was each one made a matter of record in the Commission's official reports, Mr. May?

The Witness: Each settlement was, yes.

Mr. Collins: That is what I mean.

The Witness: Each settlement was reported in the Commission's official reports.

Mr. Dorety: Well I assume that the Court will take judicial notice of the Commission's reports, and that we can refer in our briefs to any settlements that were made according to the official reports, so that I will not proceed any farther with that.

Mr. Collins: Yes, that may stand as the understanding, if there is any necessity for it.

The Court: You may assume that the Court will take judicial notice of them, but if there is any doubt about it, let it appear that counsel are both agreeable to that.

As to the particular methods and principles which were followed in arriving at the amount of $15,700,000 in February 1921, which were later changed in making either or both of the final certificates and which resulted in reducing that amount to something over $11,000,000, the witness stated that the Commission started out with the amount claimed by the carrier of $18,000,000 and something, and making certain deductions—speaking now of the February 1921 figures. Subtracting those amounts from the $18,000,000 left a residue of the $15,000,000 that you speak of. That was the process of
eliminating obviously unallowable items or seemingly
101 obviously unallowable items, leaving a residue of
$15,000,000, not with the thought that there would be any further changes, but with the thought of trying to find whether the Commission would be justified in making an additional payment over and above what had already been made at that time. When we found that deducting those items from the $18,000,000 and something left $15,000,000, and $6,500,000 having already been advanced, we felt that an additional $6,000,000 could be certified at that time for the reason that it would apparently leave a sufficient margin for possible future deductions after the Commission had determined the principles on which the maintenance should be fixed and other matters that were under consideration at that time. When the Commission made its final ascertainment reported on June 17, 1925, we had the advantage of the Commission's decisions on those matters just spoken of. We fixed the amount of maintenance to be allowed to the carrier and made such other deductions as were pertinent for the purpose, and in the ascertainment of the amount due the carrier, speaking of the Great Northern Railway Company exclusively, we found the amount necessary to make good the

guaranty to be $11,071,769.54, which amount you are comparing with an amount of $15,705,688.00, speaking roundly without the cents. There is a difference of some $4,600,000.00.

That in defendant's claim of February 14, 1921, in computing the allowance for maintenance, it applied an equation factor to its test period expenses, for increase in price of labor and materials based on its own prices and wage expense and that except for the Commission's exclusion of amounts representing increases in amount of labor it made no deduction from that particular part of defendant's claim in respect of the estimate that it made of the $15,705,688.00.

That the factor shown in defendant's return was
102 2.56819 but later changed on March 28, 1921 to 2.80688; and that in computing the maintenance allowance for final certificates, the Commission used a factor of 2.45 which was a factor decided upon by the Commission for the Great Northern Railway Company; that the method followed by the Bureau and the Commission in arriving at a factor for issuing final certificates was for the Commission to determine the factor by its own judgment on basis of all the information it had before it pertaining to the factor and that any group factor that may have been calculated for the roads of the Northwest section was given such consideration only as might be considered pertinent and proper in the determination of a factor for any individual railroad; that a factor was adopted by the Commission for the Northwest railroads and that factor was considered in arriving at a factor for defendant's final certificate, but the witness could not state just what weight was given such group factor.

As to whether in making defendant's final certificates, the Bureau was governed by the statement in 70 ICC 711, that "There shall first be deducted from the maintenance expenses of the test period all amounts included therein for (a) depreciation, (b) retirements, (c) insurance. The remainder, after being adjusted for differences in amount and use of property maintained, shall be multiplied by a factor representing the increase in the general level of cost of labor and material for the territories in which the lines of railway of the carrier are situated," witness stated that the factor of 2.45, however, was determined specifically for the Great Northern Railroad Company and did not or does not represent what the Commission considered was the general factor for the railroads in the territory in which the Great Northern operated. The territorial factor was 2.40, and you were given five points over the territorial factor, and practically

all other carriers were given factors different from the territorial factor. The territorial factor was made as I
103 say to represent the general level, as stated here, for the territory in which the carrier operated, but that was adjusted by the Commission to meet the conditions existing on any given railroad, for which that factor would not represent a fair return for the particular carrier. It was realized that the territorial factor applied to each and every carrier might result in one carrier receiving a much larger amount than it should have, and some other carrier receiving a smaller amount. Therefore, the Commission determined an individual factor for each and every carrier that settlement was made with, under the provisions of sections 209 and 212.

That the Commission did recognize that the Great Northern Railway was entitled to a somewhat higher equation factor than the average territorial factor and that would appear to be true on the face of it because the territorial factor was 2.40 and the factor arrived at for the Great Northern was 2.45.

Q. Did you in your investigations find that that increase in the Great Northern Railway Company's factor was due to the fact that because of operating managements inaugurated by James J. Hill or otherwise, the Great Northern Railway Company had done business, on a lower scale of wages and material costs than the average in the territory, and that therefore it took a higher ratio to produce the same amount of maintenance under the uniform wage scales which the Director General had put in for all railroads?

Mr. Collins: We object to that question. The Court will recall that the language of Section 209 is in these express words "There shall not be allowed for maintenance an amount any more than that fixed by the Commission." It can be no concern of this Court what considerations went into the Commission's fixation of this figure of 2.45. Our objection to it is based ultimately on the ground that whatever it may mean, it is beyond the Court's jurisdiction to consider what underlaid the factor.

(Arguments of counsel.)

104 The Court: The testimony will be received subject to the objection. You may answer if you know, Mr. May.

Mr. Collins: Exception.

(Question read by the reporter.)

A. I think it would be just the reverse from that. If their management was more efficient than that of other railroads, the factor would be less.

The Court: (To witness) Well now, Mr. May, that isn't exactly the question. He is asking whether you know what was taken into consideration by the Commission in fixing that factor.

The Witness: The Commission took into consideration first we will say the territorial factor. I do not put that first for the reason that I think it has no more weight than anything else. Second, the difference in the cost of maintenance to this carrier in the test and guaranty periods. That involved both labor and material. Third, it took into consideration the conditions under which the carrier operated, whether they were adverse or favorable. They took into consideration to some extent a comparison of the difference in costs in the two periods, on all the individual roads in that section. They took into consideration as item number 5, we will say, the difference in costs during the test period and the federal control period, with sufficient modification to consider what the guaranty period might be expected to be as compared to the federal control period.

That in the answer just given, the witness had referred to what the Commission took into consideration when it fixed an equation factor for the purpose of making the final certificate of the Great Northern.

That considering nothing but difference in rate of wages and assuming that the average wage for a certain class
105 of labor in the guaranty period was 50c an hour and that on the average in the territory the wage for the same kind of labor in the test period was 25c an hour, an equation factor of 2 for that particular kind of labor would result and that supposing one railroad in that particular territory with particularly efficient management had been able to acquire labor at 20c an hour during the test period, and during the guaranty period it would have to pay 50c an hour, its particular equation for that factor would be 2.5. That it is true that had the Commission fixed a factor of 2.57 instead of 2.45 for the Great Northern, it would probably have added more than a million dollars to the amount due the carrier from the Government. As to whether this balance of $15,700,000 would reflect an equation factor based on the defendant's experience exclusively, the witness stated that the Commission gave no consideration to what the factor might be at the time the certificate of March 1, 1921 was issued but realized

that a factor possibly would be fixed later on by the Commission. That the defendant's claim of $18,000,000 reflected the use by the defendant of an equation factor of 2.56819, based upon its own experience and that in issuing the certificate of March 1, 1921, the Commission made no deduction due to the fact that the equation factor used by defendant was based on its own experience and not on territorial experience. As to whether the Commission subsequently developed a lower equation factor than 2.56 based upon Great Northern Railway Company's experience alone, the witness stated that the Commission never developed any factor except the factor of 2.45, which the witness said was a judgment factor, but he could not say what weight had been given the territorial factor in arriving at the factor 2.45. As to whether he knew if the Commission ever determined a lower factor than 2.56 based on Great Northern figures alone, the witness stated that the Commission never determined any factor except 2.45. That in this re-
106 turn of February 14, 1921, the defendant included an exhibit showing that during the test period, it had 85% of its own freight cars on its line that during the guaranty period its cars had been so far dispersed that only 35% were on its line and that it claimed an increase in the allowance for maintaining those cars due to the smaller percentage of them on its line, and that the Commission in issuing the partial payment March 1, 1921, made no deduction on account of this; but that in making the final certificates, the Commission did eliminate all claims based on dispersion of freight cars, except insofar as they might have been allowed through the factor for increase 2.45, but allowed nothing specific for dispersion of cars, although the defendant claimed about $1,000,000 on that account; and in issuing the partial certificate of March 1, 1921, the Commission deducted nothing on account of that claim, while for the final certificate that claim was entirely eliminated and a substantial amount of the difference between the two is due to that fact. As to the truth and accuracy of the defendant's statement that in the test period 85% of its cars were on its line and only 37% were on line during the guaranty period, the witness said that the Commission never made any investigation or finding as to such percentages for the reason that it did not consider that particular feature of the claim at all.

That another feature of the defendant's return of February 14, 1921, was a claim for maintenance allowance based on increase in use of freight cars, and the formula used by defendant for computing that claim separated the use of cars as be-

tween road haul, switching and loading service, the computations being based on the Railway Executives formula; that the Commission made no specific deduction from that claim because of the use by defendant of the Railway Executive formula. But that when the Commission made its final certificates, it rejected that formula and used its own,
107 some features of which may be similar to the Executives' formula; that the effect of eliminating the separation of use between switching service, loading service and road haul service and substituting a consideration of car miles per car only on road haul, resulted in a reduction of about a million dollars in the final certificate. That the difference between the original $15,000,000 and the final $11,000,000 was accounted for almost entirely by the application of the methods of calculating adopted by the Commission instead of the methods pursued by the defendant in submitting its return, and not because of errors or discrepancies in the defendant's return of February 14, 1921; that is, if the Commission had accepted the method followed by defendant in calculating its claim, the Government would have owed the defendant well over $12,500,000, and that the difference between the claim as filed by defendant and as allowed by the Commission grew out of a difference of opinion as to the method of calculation rather than out of errors in the figure submitted.

Mr. Dorety: In order that there shall be no misunderstanding on counsel's part or on the Court's part, as to our position in the matter, I would like to state that we shall argue that from the evidence that Your Honor has already heard, and which Mr. May has given you, we believe that the only reasonable conclusion is that the Commission did in our case adopt the methods and formula that we used except to the extent that they eliminated certain items; that so far as it allowed the remainder to remain, we shall insist that there was a definite adoption by the Commission for the purpose of the Great Northern case, of those formulas and methods, and that the making of the final certificate was a change in method by the Commission.

* * * * *

Q. (By Mr. Dorety) Now is it not true that the meth-
108 ods which the Great Northern Railway Company used in submitting its claim, and which you did not challenge or eliminate from the claim, in making your partial certificate, were also used by other carriers and not elim-

inated in the making of final certificates which were made in the earlier years.

Mr. Collins: I object to that as irrelevant.

The Court: Well, I think I will let Mr. May answer if he knows of his own knowledge.

Mr. Collins: My objection goes to something a little more serious than the matter of personal knowledge. The merits of this case I think will have to be determined upon what the Commission did with respect to this carrier.

The Court: I think so too, but the claim apparently of the Government is that this partial payment was inadvertently or improperly issued, after the credit certificate had been given to the Great Northern Railway Company, and of course if it should appear that the same factors or the same methods of calculation which were used by the Great Northern Railway Company in making its claim had been recognized by the Commission at that time, what was done with other carriers might indicate that it was not an improper or inadvertent thing. If Mr. May knows about that he may answer the question.

Mr. Collins: Exception.

A. Many returns were filed with us on the basis of the Railway Executives' formula. I am not prepared to say at this time as to what was done in regard to making partial payments to other carriers, or in respect of the methods used by those carriers in filing their returns.

Q. Well now you speak of making partial payments. My question referred to final payments. Isn't it true that
109 final payments were made to some carriers on returns prepared according to the same formulas that the Great Northern Railway used in its report or return of February 14, 1921?

A. It may be that there were final settlements made with one or more carriers where returns were filed in that form, but there were no settlements made accepting the mathematical findings that would be determined by that form with all the schedules that you have, for property in use, and difference in these freight train cars at home and broad, and elsewhere. There were many controversial questions there. There was, however, sufficient informative data in there to enable the Commission to pick certain things out of that formula, that possibly might have enabled them to make a calculation that would justify them in fixing the maintenance.

I do not recall whether some of the settlements that you referred to, like the Norfolk & Southern Railroad and one or two others—they may have been settled without a positive return under the order in Finance Docket 1606, but in most cases the carrier did supplement the return in any way that we requested them to, and I happen to recall that we requested the Norfolk & Southern to furnish us with additional information. Just how extensive that was I am unable to recall.

As to whether the defendant was requested by the Commission to furnish additional information while the Commission was examining its claim of February 14, 1921, between that date and February 23, 1921, when the credit certificate was issued, the witness stated that there was consultation from day to day, and the defendant may have supplied some minor additional information, but there certainly was not any considerable additional data filed between those dates by defendant, although defendant filed everything the Commission requested.

As to whether the Bureau was following in December
110 1921, the policy and practice stated by the Commission in its decision in Docket No. 1606 reported in 70 ICC 714, namely "We are required to make a definite ascertainment for partial payment purposes as clearly as we are required to make a definite ascertainment in final settlements", the witness stated that the Bureau did not have that decision in making the certificate of March 1, 1921 for $6,000,000, and that the decision was not rendered by the Commission until December 15, 1921, but that even after the decision was rendered, the Commission never went into all the details on partial payment certificates that they would on final certificates, although they were a great deal more particular about partial payment certificates as time went on than they were when defendant's certificate of March 1, 1921 was issued.

As to whether the partial certificates were made with the understanding that in law they were just as much definite ascertainments as the final certificates, the witness stated that his understanding of what the Commission held was that no ascertainment of the amount due the carrier under the guaranty was made until final settlement was arrived at and that what he understood the Commission to mean was to make an ascertainment sufficiently definite so that the amount advanced as a partial payment would not be in excess of the amount that would eventually be found to be due the

carrier, that is, that the Commission did not at that time make a definite finding of the final amount that would be due, for if they did, they could make a final settlement then and there, but their finding was intended to be sufficiently definite to the extent that there would be no overpayment and that the carrier was entitled to not less than the amount certified.

As to whether the Commission had definitely ascertained that defendant was entitled to at least $6,000,000 when
111 the certificate of March 1, 1921 was issued, the witness stated that in the case of the defendant, defendant's partial certificate of March 1, 1921, the Commission's calculation was made in exactly the same way that it had been calculating advances, that it was based on estimate, and no ascertainment of any kind was made.

That it must have been very shortly after Section 212 became effective when the Commission began making definite ascertainments for the purpose of issuing partial certificates, even though the Commission's decision had not been rendered until December 15, 1921. That the calculation for defendant's partial certificate was made on the basis of the system before Section 212 was passed and in a manner similar to the calculation made for advances up to that time, and no further consideration was given the matter in the way of attempting to make any further [decuctions] within the two or three days between the certificate that was issued as No. A-328 as an advance, and certificate No. A-329 in which the language was changed to fit the requirements of Section 212 after it became law.

The witness stated that he did not know that Section 212 was drafted by Mr. Colston, Director of the Bureau of Finance, but that he understood that Section 212 was enacted because the Treasury Department refused to make payments on certificates for advances issued by the Commission upon applications filed under Section 209 (g) after the guaranty period had expired, and that the purpose of Section 212 was to give the Commission authority to pay additional portions of the amounts due the carrier under the guaranty.

As to whether the witness knew that in making advances under Section 209 (h), the carrier agreed to refund any excess and deposited security for such refund, the witness said he had general knowledge of that fact but did not handle that phase of the work, and as to whether he knew
112 when the certificate for $6,000,000 was issued February 23, 1921 under Section 209 (g), called the certificate

for credit purposes, that there was no agreement by defendant to refund any part of the payment and no security for such refund, the witness stated that he recalled some discussion and that they had general knowledge of the fact that securities were deposited to protect advances that had been made, that there was discussion at the time and the thought seemed to prevail at the beginning at least that the securities already deposited with the Treasury Department to secure possible overpayment on advances would still be effective even in the face of the fact that no additional security was required to be deposited in connection with the $6,000,000 payment.

As to whether in making certificate No. A-328 on February 23rd, the fact that no additional security was being put up and that it was questionable whether the old security would apply made the witness a little more careful than he would have been in the case of Section 209 (h) advances, where security was being furnished, the witness stated that his work in connection with the certificate of February 23rd was not affected in any way by any consideration that might have been given to the question of security because it was not a part of his duty to consider that question.

As to his statement that the partial payment certificate was handled just as certificates for advances had been handled, and as to whether the first time the Commission considered allowances for maintenance based on test period experience was in connection with the February 23rd certificate and that no consideration of that matter was given in making advances, the witness stated that the Commission always gave consideration in every case to the test period
113 experience for maintenance and that in data furnished with its applications for advances, defendant gave the Commission test period figures.

(At this point, counsel for defendant offered in evidence a memorandum dated March 2, 1921, from the Director of the Bureau of Finance to the Assistant Director in charge of the Accounting Section, which memorandum was received in evidence as defendant's Exhibit D and is included herewith.)

As to whether the witness had seen that memorandum and whether he was guided by it or the instructions contained in it, the witness pointed out that he could not have been guided by the instructions contained in it when the work was done and completed on March 1st, and the memorandum was not issued until March 2nd, but that very probably the memorandum came to his attention about March 2nd.

That it was a fact that new equipment cost about two and a half times as much in the guaranty period as in the test period and that in calculating the amount of the guaranty, the Commission allowed a depreciation charge during the guaranty period at the same rate allowed during the test period; that in making allowance for depreciation and retirement during the guaranty period, the Commission did give effect to the fact that new equipment cost two and a half times more in the guaranty than in the test period, in this respect that depreciation is determined on a percentage basis, that is, the depreciation would be a certain percent of whatever a locomotive cost, for example, if you have a locomotive that cost ten thousand dollars, and the depreciation is three per cent, you would have a given sum, three per cent of $10,000. If you had a locomotive that cost $50,000 three per cent of that would be more.

Q. Is it not true, that what the Commission did was to take the number of dollars charged to depreciation in the test period, or at least during an average six months of the
114 test period, and equate that in proportion to increase in investment, and that except as increased prices were reflected in any new equipment that might have been bought, it gave no effect to increase in prices?

Mr. Collins: I enter an objection to all this type of testimony on the ground that the duty of determining the amount of the guaranty and of determining all matters underlying that particular determination, was put exclusively upon the Commission, and this Court has no jurisdiction over it.

Mr. Dorety: In the question I have just asked I am getting into a field that I have not gotten into before in this cross-examination. I am seeking to show that the Commission's final certificate was not made in accordance with the requirements of the Statute. I agree that the making or the finding of the amount of the guaranty was entirely and exclusively within the direction of the Commission, but in making that finding it must be guided by the provisions of the Statute, and what I want to show is that in three or four respects, the Commission failed to follow the requirements of the Statute. My purpose in offering that is to afford a basis for asking the Court not to determine an amount of guaranty for us, but simply to declare that the Commission's final certificate was not made in accordance with the law, and is void, and therefore it could have no tendency to require anybody to refund any amounts called for by the partial payments. We claim that the Commission erred as a matter of law in not making an allowance for increase in

depreciation; also that it erred as a matter of law in not allowing anything for increase in amount of labor required to accomplish a given task; also that it erred as a matter of law in not allowing compensation under Section 4 of the Federal Control Act for the full amount of additions and betterments that we had made. Those are the three principal errors that we want to allege that they made, and I am
115 offering this testimony as a basis for that.

The Court: Well, the way I feel about this case is this; I feel that after all probably my function is more to determine who will take an appeal here, than it is to do anything else. I do not mean to say that I do not feel under obligation to decide this case as correctly as I can, but after all, it is ultimately going to be decided by some other Court, and I am inclined to let each one of you make up your record in the way that you want it, making such objections and taking such exceptions as you care to take, and for that reason I am being rather liberal in my rulings, not necessarily following my own thoughts as to just how the record should be made up; so I think I will let Mr. Dorety go into that matter that he is going into, and of course the record will show that you have an objection and an exception as to the admission of the evidence.

Mr. Collins: May the record also show, for the purpose of the record in this and perhaps in other cases, so that I will not be met with the proposition in other cases, that the evidence is objected to also because it seeks to employ this Court to correct an alleged error of law committed by the Commission, and that I object on the ground that the Commission has the exclusive jurisdiction to determine law questions and to place the interpretation upon all the provisions and requirements set forth in Section 209, including such questions as counsel may term questions of law, as well as the amount of the guaranty, because the Commission obviously never could reach the amount, unless it had jurisdiction to settle finally each of these principles raised upon each of these Statutory provisions, and that finality attaches to its determination of the principles laid down, the same as regards the amount of the guaranty.

116 The Court: The record may show that you have that general objection to all of this testimony, and that it is your theory that it is of no interest to this Court whether the Commission was right or wrong in its final conclusion, and you have an exception to the reception of all testimony bearing on that question.

(Last question read by the reporter)

A. In Finance Docket 1606, decided by the Commission December 15, 1921, appearing in the Commission's reports at Volume 70, beginning at page 711—which is on page 5 of Government's Exhibit 5 in this case—appears the Commission's instructions in that respect. It has reference to the equation for maintenance, and says that; "There shall first be deducted from the maintenance expenses of the test period all amounts included therein for (a) depreciation, (b) retirements, (c) insurance. The remainder, after being adjusted for differences in amount and use of property maintained, shall be multiplied by a factor representing the increase in the general level of cost of labor and material for the territories in which the lines of railway of the carrier are situated. To the product thus arrived at shall be added back the deductions hereinabove provided for, adjusted for differences in amount and/or use of property maintained." Doesn't that answer your question?

The witness stated that he thought the test period depreciation was adjusted only for increase in amount of property maintained, pursuant to the order of the Commission just mentioned and that schedule 5 of the order just mentioned indicates a table for that information.

As to whether in making its final certificates, the Commission investigated or determined the question whether it was necessary for the defendant to employ more hours of
117 labor to accomplish the same task in the guaranty period than in the test period, the witness stated that a great deal of thought was given to the matter through conferences with the carrier and exhibits filed in connection with fixing the factor, but that no specific allowance was made on that account, unless it might be considered to be reflected in the factor of 2.45, but that the Commission had at that time announced its decision declining to allow for ineffectiveness of labor. That the Commission had been furnished a large volume of evidence by the carriers tending to show that it would require more hours of labor in the guaranty period than in the test period to accomplish the same work and that a hearing was held on that matter before the full Commission, that the Commission had very elaborate information before it on that question and rendered a decision which established the Commission's rule but did not decide whether or not more labor was required in one period than in the other; that the Commission had before it all the data and information concerning the ineffectiveness of labor including defendant's statements that ineffectiveness of labor was very material on its line and that this fact might have influenced

the Commission in fixing a factor of 2.45 in lieu of some lower factor, but that if there was any allowance to defendant on account of ineffectiveness of labor, it would have to be represented in the factor of 2.45. That the maintenance allowance for the guaranty period was based upon a half year's expenses during the test period and that the defendant submitted a claim to the effect that during the guaranty period its maintenance expense of way and equipment would necessarily vary more than half of a year's expense because expenses during the summer months of the guaranty were higher than expenses during the six winter months and claimed that to arrive at a just allowance, the Com-
118 mission should have taken defendant's test period expenses for the maintenance of March to August, inclusive, for the three test years, and equated that amount; but that the witness could not recall the amount involved in that claim or whether the Commission gave it consideration other than to deny it.

That the methods employed by the Commission in calculating for final certificates produced an allowance to defendant for guaranty period maintenance approximately $6,000,000 less than the amount defendant actually expended for maintenance during the guaranty period, but that the Commission allowed maintenance on basis of the proper amount to be expended and not on the basis of the actual amount expended, but that the actual amount expended for maintenance would be there in the tracks, cars and locomotives.

(At this point the Court announced recess until the following morning at 9:30)

St. Paul, Minnesota,
June 24, 1931,
9:30 o'clock A. M.

All parties being present as aforesaid, pursuant to adjournment, further proceedings were had at the above time and place as follows:

MORTON T. MAY, a witness previously called and sworn, recalled by the defendant for further cross-examination, testified as follows:

Cross-Examination (By Mr. Dorety, continued)

That on page 30 of Schedule C-3, Defendant's Exhibit A, defendant's return of February 14, 1921, defendant based its

claim for increased use of freight cars on the assumption that 65% of the cost of maintaining freight cars would vary with intensity of use and that the Commission made no specific deduction on that account, except as might have
119 been made in the deduction in connection with the $6,000,000 certificate; but that in the final certificate, the Commission adopted the rule that 60% of freight car maintenance expense would vary with intensity of use instead of 65%, and that is one factor which resulted in reducing the amount allowed in the final certificate.

That it is true that in connection with the witness' statement that defendant reduced its claim from time to time in various returns filed after February 14th, that those reductions were the result of applying the formula which the Commission itself designated in Docket 1606 and several of the deductions and some of the additional information was filed at the special request of the Commission.

Mr. Dorety: If it please the Court, I have here a copy of the communication from the Director of the Bureau of Finance in the form of a memorandum to Division 4 in the case of Chicago, Milwaukee and St. Paul Railway Company, final settlement, dated November 22, 1921. I would like to ask permission to file it, subject to the same conditions under which we filed the memorandum from Director Colston to Mr. Bunting, that is, that it can be filed, and if there is any error in it, it may be corrected.

(Defendant's Exhibit E marked for identification by the reporter.)

The Court: It is offered subject to verification of it, and to the objections made?

Mr. Dorety: Yes.

Mr. Collins: Subject to the various objections which I have made in connection with the others.

The Court: That may be the understanding.

Mr. Dorety: There are two or three particular sentences in it, that I would like to call to the Court's attention at this time. The memorandum states; "We have ascer-
120 tained, for the territory in which the Milwaukee is located, a general factor of 2.40 for adjustment of differences in cost of labor and material. Using this factor for adjustment of differences in cost of labor and material, and correcting certain errors found to exist in the previous ascer-

tainment, there is indicated an overpayment of $359,899.08, but the report does not show any overpayment for the reason that it is believed that in so far as the determination of differences in cost of labor and material rests in the judgment of the Commission, its previous ascertainment for the purposes of partial payment was just as definite and valid upon the facts then considered as a subsequent determination made in the light of additional information."

* * * * * *

Mr. Collins: If the Court please, in connection with the matters concerning which Mr. Dorety is attacking the correctness of what he calls conclusions of law reached by the Commission in making its certificate of June 17, 1925, and concerning which certain phases of that certificate he has asked some questions of Mr. May, I am in somewhat of a quandary as to just what course our evidence should take. I take it that the Court's decision to let the matter in subject to the objection is little more than a deference of the ruling until some time when the Court considers it. Therefore, when the Court comes to make up its mind as to whether it will give consideration to that evidence, we of course will not be present. I do not want to fill the record with discussion and testimony to justify the Commission's conclusions unless it is absolutely essential. I do not see how else we can do it, however, unless we should have a further hearing based on the Court's conclusion.

The Court: Well my present conclusion—I will be frank about it—is that it is not essential for you to do that.
121 Now whether after I hear the argument, I will change my mind about it, I can't say, but I can say that I don't think so,—that I will not determine the question as to whether the Interstate Commerce Commission was right or wrong in using the factors and in doing as they did.

Mr. Collins: I was not attempting to force Your Honor to change the ruling, or to rule now. I simply wanted the record to show. It might be that I would find myself in a position where it would be necessary for me to ask for a further hearing if the Court felt that these matters were particularly important in this lawsuit, and that the Court was going to give them consideration.

The Court: Well, let's put it this way, that if it should be ultimately determined that that issue is an important issue in the case, that you may reserve the right to put in whatever evidence you desire on that point.

Redirect Examination (By Mr. Collins.)

As to what the before mentioned "factor" was and how the Commission arrived at it and how it checked the guaranty, the witness stated that the figure of 2.45 fixed by the Commission to measure the allowance of fixation for maintenance in the guaranty period would represent a ratio of guaranty period costs to test period costs. To make it perfectly clear, it may be said broadly speaking, that maintenance, the cost of which in the test period would be $1.00, would be expected to cost $2.45 in the guaranty period. Prices had increased, as is a matter of general knowledge. The Commission in determining that factor, examined and studied all of the data presented by the carrier. In addition to that, it had informed itself as to the differences in prices and costs generally in the various territories throughout the country. It had before it sworn returns from practically all of the carriers that had accepted the guaranty, and after making a very profound study of the situation in the Great Northern
122 Railway Company's case, it was decided that in the judgment of the Commission, a factor of 2.45 would give the carrier substantial justice in fixing its maintenance. The Commission determined to fix the maintenance very largely on the basis of the factor, by virtue of previous studies made over a long period of time, as being the only practicable method of fixing the maintenance for the guaranty period. That in fixing the factor of 2.45 for the defendant, the Commission considered all the relevant facts and circumstances that were brought to its attention by the defendant, including not only the general level of prices or general trend of prices in the territory in which it operates but also all of its peculiar circumstances, submitted to support its claim that it was entitled to a higher factor than the general level in the territory, including its location in the northern part of the country where maintenance must necessarily be made largely during the summer months and they claim that by exceptional diligence, defendant obtained labor during the test period and possibly material also at lower rates than were paid generally throughout the territory during that period, whereas, in the guaranty period rates for labor were more or less standardized and generally beyond defendant's control; that the Commission gave profound consideration to all these matters and concluded that the factor of 2.45 would satisfy the equation factor in fixing the maintenance for the carrier and would be fair to it and the Government.

That with respect to the suggestion that the Commission

might have adopted the Railway Executives formula, the witness stated that the Commission never at any time was in the position of accepting any factor or any other determination that might be made either mathematically or otherwise from application of the Railway Executives formula and that no factor made by the Commission was predicated on that formula. That the factor of 2.45 for the Great Northern Railway Company was approved on December 29, 1923,
123 by the Director of Finance, and that the Commission's approval of the 2.45 factor came with and as part of its decision of June 17, 1925, issued with knowledge that the factor had been applied, although the Commission rendered no separate decision adopting the factor; That between December 29, 1923 when the Director of Finance approved that factor and June 17, 1925 when the Commission made its final determination, the Commission was informed at great length by defendant in respect to the data upon which the factor was predicated, the defendant endeavoring to obtain application of a larger factor than 2.45. That the factor to be applied to defendant's claim was in controversy before the Bureau of Finance, and the Commission between the date of partial payment of March 1, 1921 and final settlement on June 17, 1925. That pursuant to permission of Division 4 of the Commission, the defendant submitted additional information and filed briefs and elaborate additional data and argument, the brief being dated August 13, 1923, contending for a higher factor than 2.45 On October 30, 1924, Walker D. Hines filed a brief on behalf of defendant setting forth his reasons why the factor should be higher than 2.45. That after all those things had been considered, the Commission again reached the conclusion that a factor of 2.45 would be fair to defendant and the Government.

Q. Did the Commission use any factor at all, as such, temporarily fixed or otherwise, in issuing the partial payment under Section 212?

Mr. Dorety: If it please the Court, I am going to object to that question. It is similar to questions asked before. It seems to me that it plainly calls for a conclusion of the witness, and I am making the objection in order to lay that contention before the Court. We have the facts as to just what was done. The claim was made on that factor, and the Commission allowed it. Now whether that involved an approval of the factor is a conclusion.

124 The Court: I rather think he has covered that subject, Mr. Collins in his previous testimony. As I understood it, he claimed that there was a controversy at that time

as to what the proper factor should be, and that the Commission had not given any instructions as to what factor to use, so I have gathered from Mr. May's testimony that the Commission had not at that time fixed or formulated any particular factor in connection with these partial payments.

Mr. Collins: That is true. That is my judgment, from the testimony, Your Honor, and I think it must be concluded from the testimony that it is an absurd contention that the Commission did apply any factor fixed by it, in making partial payments, but it is a fact I think which the witness can state, as to whether they used any factor for the purpose of multiplying test period figures.

The Court: Yes, if that is the purpose I think he can answer the question.

Mr. Collins: And also it is to get into the record, a definite statement which will tend to offset what I regard as a chain of rather circumstantial evidence which counsel for the defendant has attempted to set before the Court, to show that the Commission must have used this factor and applied it.

The Court: Well, he may answer that question.

A. No factor was used, so far as my knowledge of the matter goes, in making the partial payment. Consideration was given of course to the difference between the costs in the test period and in the guaranty period, but we had not at that time reached the point of working it out on the proper basis. We had, from time to time, in making partial payments, considered that we would be reasonably safe in saying that the maintenance in the guaranty period would cost twice as much as it did in the test period, but that was
125 not in the nature of a factor, that was being made after a study, or the like of that, and I do not believe that it could be dignified by giving it the title of the word "factor".

That as to the cost of maintenance in the guaranty period being at least twice as much as in the test period, the Commission made no mathematical or other calculation but reached that conclusion by "common sense".

Q. Now I will ask you to state whether the Commission regarded its certificate of March 1st, 1921, as a definite ascertainment?

Mr. Dorety: I will object to that as calling for a conclusion of the witness.

(Arguments of counsel.)

The Court: Objection sustained.

Mr. Collins: I will change the question.

Q. I will ask the witness if he as the Examiner in Charge of the Accounting Section of the Bureau of Finance, regarded this certificate as a definite ascertainment?

Mr. Dorety: I will object to that not only on the ground that it is a conclusion, but that it is an attempt to impugn the direct statement of the Commission itself, which certified that they did make a definite ascertainment, and that it could not be reduced by further accounting. It is an attempt to impugn that statement by a statement of the Examiner in Charge of the Bureau.

The Court: Well it might have some bearing on this contention of the Government to the effect that if they attempted to do something which they were not authoried to do by the Statute, they exceeded their authority.

Mr. Collins: That is it exactly.

The Court: I think I will take the answer subject to the objection.

126 A. That certificate as I understand it, was the outcome of the refusal of the Secretary of the Treasury to honor certificates that had previously been issued. It is my contention that no definite ascertainment had been made.

Mr. Dorety: That is objected to—

Mr. Collins: Read the questions please.

(Last two questions and answers read by the reporter.)

A. (Continued) I did not.

Q. Did you then, at the time of its issuance?

A. I wouldn't say that I knew that it was issued just at that particular moment.

Q. What?

A. I can't say that I knew that that certificate was issued on the first day of March.

Q. Well, did you at any time regard it as a definite ascertainment? A. I did not.

Q. Did you regard the analysis and examination made in your Bureau as being a sufficient basis for a definite ascertainment for making a Section 212 certificate?

Mr. Dorety: May it be considered that all of this line of testimony is subject to our objection?

The Court: Yes, and exception allowed. He may answer.

A. I certainly did not.

Q. Did the Commission at any time conclude or find that $15,000,000 was the amount definitely ascertained as being due the carrier to make good the guaranty?

Mr. Dorety: Objected to as calling for something in the state of mind of the Commission.

(Arguments of counsel.)

127 The Court: I think it is the intention of the question, that so far as the $6,000,000 in the certificate was concerned, that was definitely ascertained to be due, but I suppose the carrier would not contend that the $15,000,000 which was not eliminated from its statement constituted final ascertainment of the amount which was due it.

Mr. Collins: If the carrier is willing to adopt that as a statement of fact—

Mr. Dorety: No, I do not claim that the Commission ever ascertained that the $15,000,000 was due.

The Court: All right.

Mr. Collins: Let the record show that then.

That it was on June 17, 1925, that the Commission first announced its finding as to the amount necessary to make good the guaranty to defendant. That with respect to the necessity for acquiring security for the payment under the credit certificate of February 23, 1921, the Commission understood that the certificate would be used by defendant as collateral to borrow money from a bank and not to obtain money from the Secretary of the Treasury as it was rather understood that the Secretary would not honor that certificate.

Recross-Examination

By Mr. Dorety:

That this Price Board was an organization within the Commission for the purpose of considering data concerning differences in cost of maintenance in the test period and guaranty periods, with a view to making recommendations to the Assistant Directors based on conclusions reached after considering information submitted by the carrier; it consisted

of one attorney, one engineer and one accountant, and was organized after this certificate for $6,000,000 was
128 issued. That Price Board recommended to the Assistant Directors that a factor of 2.45 be adopted for the defendant, although at one time there was a division of opinion in the Price Board concerning the factor and a minority recommended 2.50. The witness said he had no knowledge of counsel's suggestion that the Price Board was reorganized to comprise 5 members and then recommended a factor of 2.50 after hearing defendant's evidence and arguments and that he did not think the Price Board ever recommended 2.50 except in a divided opinion. That the Price Board's recommendation of a factor of 2.45 was a unanimous opinion of its three members and that the divided opinion in which three members of the reorganized Board recommended 2.50 was after defendant had submitted briefs and arguments but that it was nothing more than a recommendation. This factor of 2.45 was recommended before the hearings accorded defendant by the Price Board, and the factor of 2.45 was approved by the Directors on December 29, 1923, and then defendant filed these briefs before the Price Board after consultation with Division 4, and the witness thought it was true that the defendant convinced three out of five members of the Price Board that the factor should be 2.50.

(At this point the plaintiff concluded its direct testimony.)

VERNON P. TURNBURKE, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Dorety:

That he lived in St. Paul, was General Auditor for the Great Northern Railway Company; that he was a graduate engineer and worked four years in engineering departments of various railroads and had been engaged in statistical work since 1914, analyzing statistics, testifying in rate cases and making up cost figures, etc.; that during Federal Con-
129 trol he was Assistant Manager and later Manager of Operating Statistics Section of the United States Railroad Administration at Washington in charge of compiling data submitted by railroads for managerial purposes of the Administration.

As to his connection with the guaranty period settlements of the defendant, the witness stated that he prepared per-

sonally all the claims for maintenance and followed them through their various negotiations with the Interstate Commerce Commission, including the return of February 14, 1921, the figures of which were taken from the defendant's books and correctly stated the facts they purported to state, including the transactions of the defendant during the test period and guaranty period, except amounts specifically shown in that territory to have been estimated. That the only estimates included in that return are amounts set up as reserves to take care of delayed items such as loss and damage to freight, injuries to persons and other casualty claims then on file with the carriers but settled at a later date, and also the carrier's claim for maintenance based on test period expenditures.

As to why the defendant's return of June 14, 1920 showed a net railway operating income of $7,000,000 and its return of August 23, 1920 showed an income of nearly $4,000,000, and its return of February 14, 1921 showed a deficit of over $3,600,000, the witness stated that at the time of the first return, an estimate was included, as to the operations of the defendant in the later months of the guaranty period, and at that time we had no knowledge of the award which was later made by the United States Labor Board on July 20th, substantially increasing the wages of most of the employes retroactive to May 1st. At the time the second return was made, we included an estimate of the amounts estimated at that time to be payable under this wage award of $4,000,000,
which later turned out to be about $4,300,000. In the
130 second return, the revenues and expenses for July and
August—certainly for August—were estimated, and not the actual figures, while the third return of February 14, 1921, included all transactions properly allocated to the guaranty period, including delayed items which had occurred in our accounts up to December 31, 1920. In other words, the return of February 14, was the first definite positive return based on the guaranty period operations without including estimates of the operations for any months, but only including estimates for additional amounts which it was thought at that time would come into our accounts affecting that period.

That with respect to the nature and extent of conferences between defendant's representatives and the Commission between the filing of the return of February 14th, 1921 and the issuance of the certificate of February 23, 1921, and as to what additional data was requested, the witness stated that he made notes daily at the time these transactions occurred

in Washington in February 1921 and that the notes showed that the return was filed February 14th, that on February 16th, he with other officials of defendant, went to the Director and Assistant Directors of the Division of Finance to inquire as to when the return would be audited and were told that the checking would begin at once and that it would be considerable assistance to the Commission if someone familiar with the claim would sit with the Commission's representatives and explain the nature of the claim and furnish additional information, etc.; that on February 16th he reported to Mr. May who was checking or had charge of checking the return and that his definite recollection was that he spent the entire time every day with these representatives of the Commission until the final determination was made some six or seven days later; that he was referring to the certificate dated February 23, 1921.

131 That as to whether the Commission found or used an equation factor, the witness stated that he was kept fully informed as to what the Commission was doing, that it was no secret, and that he had in his files and his working papers which they furnished him and from those papers it could be mathematically determined exactly what they did. The defendant was informed as to what was covered in the deductions made by the Commission which reduced the claim of February 14, 1921 from $18,500,000 to $15,705,688; The carrier claimed an equation for the depreciation on retirements under this maintenance of way and maintenance of equipment and the first piece of information requested was as to how much depreciation and retirements were included in the test period figures in order to eliminate them before applying an equation factor, and that those amounts were furnished by defendant and the Commission's estimate of $15,700,000 was based on the elimination of those amounts. That under "Repairs to steam locomotives", the carrier claimed an equation factor of 2.64 based on comparison of actual cost of making similar repairs to defendant's locomotives in the two periods; that representatives of the Commission decided to eliminate from consideration the ineffectiveness of labor and requested defendant for data showing increase in price of labor and material omitting entirely the question as to how effective the work was, and that defendant furnished this information to the Commission and its allowance for steam locomotive repairs was based on details furnished by the carrier showing change in prices of labor and material.

That as to how the amount of the deduction from main-

tenance of steam locomotives was computed by the Commission's representatives, the allowance claimed by defendant included depreciation and retirements in the test period to which was applied the factor of 2.64 representing increase in cost of repairs shown on page 21 of Schedule C-3 and that the Commission's representatives eliminated this de-
132 preciation and retirement factor amount and applied a factor to test period figures after such elimination, but that they did not apply a factor of 2.64 but some smaller factor based on details furnished by the carrier, while the examination was in progress, showing change in price of labor and material for locomotive repairs. That smaller factor was computed by the Commission though it might have been computed by the carrier in the first place and checked by the Commission. That the Commission made a thorough mathematical check of the figures in these returns to satisfy themselves that there were no mathematical errors and for this item it extended test period figures by this equation factor on locomotive repairs. That the same situation existed on defendant's passenger car repairs in connection with which details were furnished the Commission's representative Mr. May. That there were deductions made in the report of the Bureau to the Commission as a result of applying a smaller factor than the company had claimed in its return and that, as to who prescribed the methods for computing the smaller factor, it was computed on basis of the charges for labor and material on the formula first originated by the United States Railroad Administration.

That the return of February 14, 1921 shows an average factor of 2.66 for maintenance of equipment and the report of the Bureau to Division 4 reflected smaller factor. That it might be explained to avoid confusion that the 2.45 figure and the 2.50 figure and the 2.57 figure of which there has been considerable discussion, was a composite factor applying to maintenance of way and structures and maintenance of equipment, all lumped together in one factor. At the time the return of February 14th was filed, no one had any such idea in their head,—I had never heard it advocated, and I believe I am safe in saying that no one had thought of pre-
paring a composite factor based on lumping every-
133 thing together, and getting one figure. What was done at that time and what was done under circulars 101 and 109 by the Railroad Administration, one pamphlet on maintenance of way and one pamphlet on maintenance of equipment, was to find a separate factor for sub-items under those maintenance headings. For example there was a separate factor found for locomotive repairs; there was a separate

factor found for freight train car repairs; there was a separate factor found for passenger train car repairs, reflecting the increase in prices of labor and material, applied to those particular groups of equipment. Now when the statement is made here, that the Commission determined no factor, it is true that they did not determine an aggregate factor, on a lump sum basis, like the 2.45 was determined, but they did determine or they used—whether you call it a determination or not—they used a factor in the February 14th, 1921, determination, and the $15,700,000 finding is the result of that audit. They used a factor for each and every one of these items, and another factor for maintenance of way based on the carrier's experience, and not in any sense a factor of 2.00 or a general factor of any kind or any form; but a factor supported by the details shown in this return, listing in great detail the number of hours, and the number and amount of wages paid, for the different classes of labor, and the number of units and the prices paid for the different classes of material actually put into the property during the test period, and a separate factor worked out for these individual items I have been discussing, and mathematically applied to the test period figures, to determine the allowance found of $15,700,000, the only deductions from the carrier's figures so far as the factor is concerned, being these steam locomotive repairs and passenger train car repairs wherein they requested data similar to that which we had furnished in this claim for the other items, and used the data which we furnished them in determining an equation
134 factor to apply to the test period figures; so that they themselves determined an equation factor for maintenance of equipment different from what you had claimed, and by methods determined by themselves. This method was the one that the United States Railroad Administration was using at that time, and continued to use. In fact it was developed by the engineers of the United States Railroad Administration, and their accountants, and prescribed for the carriers nearly two years prior to the time of this return.

That as to how the data furnished by defendant showed a higher factor than the factor which the Commission adopted for railroads in defendant's territory, the group factor found for the Great Northern Railway Company was 2.45—I think an improper inference might have been drawn from his testimony, that this increase up to 2.45 over the territorial factor of 2.40 was the result of any consideration by the Bureau of testimony offered by the carrier. The facts are that the Commission itself fixed the factor of 2.45 without consulting the carrier, and without its knowledge, and after fixing this

factor, it advised the carrier of this fact, whereupon the carrier sought to have this factor increased, unsuccessfully. Whatever unusual situation existed in the Great Northern's case, the Commission itself partly recognized in its increased factor from 2.40 to 2.45, and the pointing out by the carrier of the additional factors had no effect on this factor which the Commission itself determined and continued to determine in its final determination.

As to what were the unusual situations in defendant's case, which indicated a higher factor than the territorial, the witness stated that this composite factor is based on a multitude of smaller items, the different groupings under the maintenance of equipment accounts, the maintenance of way accounts, each of which items had a different equation factor, and also the fact that the factor for labor and the factor for material was very substantially different.

135 The factor for labor for example was sixty points above the factor for material. Therefore the proportion of labor and material that was applied in the test period by the various carriers, was very material in the amount of the equation factor finally arrived at. Also, the proportion of maintenance of way expenditures as compared to the total of maintenance of way and equipment was very material, because the maintenance of way factor was higher than the maintenance of equipment factor. That was due to the fact that in the maintenance of way, the principal labor accounts are your section men, common labor, in 1915, 1916, and 1917, the test period, but were working under the standardized wage determined by the Labor Board in the guaranty period. The shopmen and mechanics who did work on locomotives were organized in the test period and were on a higher basis of wage payment, so that while their wages had been increased, the ratio of increase was not so great. Therefore, the Great Northern Railway Company was in a different situation from the average railroad in this territory, because the ratio of test maintenance of way expense to test maintenance of equipment was much higher than for other roads. That is partly due to the fact that the traffic on our line is thinner than that on the neighboring lines, so that although we would be maintaining a certain number of miles of road, the number of cars and locomotives passing over those miles would be less than for surrounding roads. In fact, the Great Northern Railway Company's ratio of maintenance of way expense to maintenance of equipment, in the test period, was about 121 per cent, whereas the composite factor, including the eight important

railroads in this territory, including the Great Northern Railroad Company, was only 101 per cent, so the maintenance of way factor is 10 points above that of the maintenance of equipment, and this had a material bearing upon the higher factor for the Great Northern Railway Company.

Now the Great Northern Railway Company also had
136 a much higher proportion of labor expenses to material, its ratio being 241 per cent, compared with 197 per cent for the average of the eight railroads including the Great Northern. That is to say, that for every dollar of material disbursed on the Great Northern in the test period, $2.41 was disbursed for labor. There are many underlying causes. The fact that we were getting our material at a lower price, and because of our proximity to labor supply—it all helped to make this situation. In any event, it has not been controverted and it is correct, that the fact that the labor factor is generally about 60 points above the material factor, and with the biggest proportion of labor on the Great Northern common labor, there would have to be additional allowance over the group factor made for that reason. That is, the price of labor increased at a higher ratio than the price of material did, from the test period to the guaranty period for all the railroads, about sixty points above. That another reason why the Great Northern Railway Company's factor was higher than that for neighboring railroads was because in our material factor we had a smaller proportion of freight charges than other roads in this territory, due to the fact that from 67 to 70 per cent of our repair material was bought on our line, without including freight charges. Now the freight rates had gone up much less than had the prices of material, the ratio being in the guaranty period about 1.3 for freight rates, so that they were approximately 30 per cent above the test period level, while in general the ratio was about 2.2 as the other carriers had included in their material accounts, much more freight than had the Great Northern, and the effect of this fact means that the Great Northern Railway Company's percentage increase would be higher, in stepping from the test period to the guaranty period than was the case with most other rail-
roads. It is a further fact, that in the test period we
137 were securing our labor at a lower price than any neighboring roads, particularly the roads in this 2.40 group which includes the so-called Northwestern region, the Northwestern railroads, for instance, the Chicago, Milwaukee and St. Paul Railroad, the line to the east of us, operating in a territory where competition from industries made for a higher rate of labor, a higher rate paid for labor in the

test period; whereas, in our section, being essentially an agricultural territory, with local labor available, we were not forced to pay the high rates which the other carriers did pay in the test period. When we came up to the guaranty period, everybody was on the same level, because of the standardization of wages from coast to coast. We were all in the same fix, so that the real determining factor is, "what were you doing in the test period" as comparing one railroad with another. That the factor of 2.45 was not adequate to represent the actual increase in the composite prices of wages and material, which the Great Northern Railway Company was obliged to incur.

Mr. Collins: If the Court please, may it be understood that this testimony is all subject to our objection?

The Court: Yes, that your objection goes to all this testimony and you may have an exception.

That defendant's actual increase, which it was obliged to pay for labor and material, omitting this controversial question as to ineffectiveness of labor, was 2.57.

That in his negotiations and discussions with the Commission, no one connected with it ever claimed that 2.45 would reflect the actual increase in prices which defendant itself was obliged to pay.

That the figures on page 34 Schedule C-3, defendant's Exhibit A, in which is shown the percentage of owned cars on home lines in the test and guaranty periods, are correct and that the amount included in defendant's claim by
138 reason of the fact that 85% of its cars were on its line during the test period and only 37% during the guaranty period was slightly over $1,750,000; that in his conferences with the Commission's representatives, they indicated that this portion of defendant's claim was allowed in full in making up the partial certificate of March 1, 1921 or February 23, 1921; that this portion of defendant's claim was eliminated by the Commission in making the final certificate. That the formula prescribed by the Commission in Docket 1606 for final certificates made no provision for allowing such claim as this and that the amount thus eliminated from defendant's claim in the final certificate was $1,753,000. That the percentage of owned cars on home line affected freight car maintenance expenses because during the test period defendant had 85.3% of its own cars on its line; a much higher per cent than was the case with neighboring roads, and that during the guaranty period only 37.1% of defendant's cars were on its line; that there are

many reasons why the cost was higher to maintain foreign cars than owned cars, in the first place the tendency is to make only such repairs as will keep foreign cars in service, whereas, for owned cars, more attention is paid to the condition of the car with the view to cutting down future maintenance. Again, standard parts are available for home cars, millwork, such as sills, end posts, and so on, can be done by machine at centralized points at low cost. With the foreign car, no such condition exists, and it is often necessary to hew out a sill, for example, from rough lumber at outlying points at considerable expense, using the old sill as a template. With unusual needs, for such large numbers of grain tight cars, because the Great Northern is primarily a grain carrying road, additional expense was entailed by repairing cars in serviceable condition for other freight, to make them fit for grain loading. Bulk grain and particularly wheat and flax will run through very small holes in the
139 floor of a car almost like water, and it was good economy during the guaranty period to spend money repairing cars to reduce the freight claims which we later would have had to pay, and which would of course have operated to reduce our net earnings during the guaranty period, that is, the additional freight claims would have operated to reduce the earnings, and therefore would have increased the amount necessary to be paid by the Government to make good the guaranty.

That defendant's return of February 14th included a claim for increase in use of freight train cars from the test period to the guaranty period other than this claim for increase in use due to the percentage of cars off its line and that the amount of increase in use is correctly shown at pages 30 to 32 of Schedule C-3, defendant's Exhibit A, based on Great Northern experience. That this claim for increase in use of freight train cars is based on the formula worked out by the equipment sub-committee preparing the executives' formula. I believe it has been so characterized here. This equipment sub-committee was composed of superintendents of motive power and practical mechanical men from the large representative railroads of the country. By making elaborate studies covering a multitude of data, covering these railroads owning 88 per cent of all the freight train car equipment in the country, they developed this formula for the increase in use of freight train cars, comparing one period with another. This formula divides the element of increase in use into three parts; one, the increase in use due to more yard switching at terminals, which is very hard on repairs to cars; two, increase in use due to

more intensive handling on road haul, that is, longer movements of cars, more car miles per car on line; and the third element, that due to loading and unloading freight, that is, the damage to sills, and the floor of the car when freight is loaded or unloaded from these cars. They determined that
35 per cent of equipment repairs would vary with the
140 difference in yard and train switching service; 22 per
cent would vary with the difference in road service; that 8 per cent would vary with the unloading and loading, a total of 85 per cent, and that the other 35 per cent of the repairs are due to elements not connected with use, that is, the general deterioration of the car, which would occur if it was not used at all—35 per cent. We determined the factors which they recommended separately for the yard and train switching, road service, car miles, and the trains loaded and unloaded in both periods, and applied our increase in intensity of use separately to those three parts, from which we developed a total factor, instead of the 65 per cent which I have referred to—a factor of nearly 32 per cent as representing the actual increase in allowance necessary to be made the Great Northern Railway Company under this formula for intensity of use of freight cars. All of this is shown on pages 30 to 34 of Schedule C-3, Defendant's Exhibit A. That he discussed that particular part of defendant's claim with the Bureau representatives during the conferences in February and those representatives indicated that they allowed that part of the claim in full. That according to the formula in Docket 1606, this allowance for increase in use of freight cars was determined by using ultimately 60% and considering only one factor, namely the movement of the car, the car miles per car maintained—instead of dividing the use into three parts; that a further difference was that instead of using 65% as varying with use, the formula allowed only 60%, so the two figures using only one part instead of three and using 60% instead of 65% accounted for a difference of $1,013,000 in the final certificate.

That in its return of February 14, 1921, defendant claimed an increase in test period depreciation and retirement
charges on account of increase in prices of labor and
141 material and that the Commission did not allow that
claim either in their determination on the February 14th basis or ultimately. That the theory on which that claim was set up was that the cost of equipment during the guaranty period was considerably in excess of what it was in the test period—approximately two and one-half times as much per unit. By the use during the guaranty period of our equipment with the same average life of equipment, there

was included one-half of a year for the guaranty period proportion of the life of the equipment, but at a higher basis of value of equipment; in other words, when we came to replace this equipment, which had been used during the guaranty period, we were obliged to pay two and one-half times what we originally paid, and the results of operation in the guaranty period were therefore to give a net railway operation income for that period, under the determination as found by the Commission, based solely on our depreciation in the test period, and the rates then in effect, whereas as a matter of fact we were running out the life of a more valuable unit than the Commission was allowing us for, if they did not equate that depreciation and retirement.

That the rate of depreciation on equipment charged by defendant on its books during the test period was approximately 2% and that its later experience shows that the rate should be 4%, which defendant is now using, and that the Director General used a rate of 4½% on equipment including new equipment purchased during Federal Control; that as to whether the Commission made any allowance in its final certificate for increase in the test period depreciation and retirement charges, the witness stated that the allowance made by the Commission was based solely on the change in amount of property or equipment that was being depreciated, using the same rate in both periods and using the same value for the equipment that existed in both periods.

That defendant's claim of February 14th included a
142 claim for increase in cost of labor aside from the increase in rate of wages, mainly the claim under steam locomotive repairs and passenger car repairs where defendant made a determination of actual labor cost, of accomplishing certain specific repairs on certain classes of locomotives and cars in the test period and the actual cost of the same repairs in the guaranty period, shown on pages 21 and 26 Schedule C-3, Defendant's Exhibit A. That the figures on that page accurately show the actual experience of defendant in increase of total cost of labor necessary to accomplish the given task for an average six months of the test period compared to the guaranty period, and the effect of the increase in the number of hours necessary to accomplish these particular tasks.

That insofar as defendant's claim made allowance for increase in number of hours necessary to accomplish the same amount of work, the Commission rejected it before making partial payment certificate of March 1, substituting the figures which were furnished them at the time the examination

was being made and the amount thus eliminated was approximately $850,000, no part of which was allowed in the final certificates. That $1,192,000 was eliminated from defendant's claim on account of equation on depreciation and retirement charges because of the Commission's method of equating only on changes in amount of property, and that this difference of $1,192,000 is due to the difference between defendant's claim for an equation based on additional cost of labor and material against the Commission's allowance of an equation based on account of property maintained.

As to what changes there were in labor conditions between the test period and guaranty period resulting in this increased amount of labor necessary to accomplish the same task, the witness stated that there were many reasons, the principal one was the disorganization of our force, the dis-

organization of the personnel of our force, due to war
143 conditions. New men were employed that were not as skilled as the old men. Some changes in working conditions occurred, such as, during the test period, the men went to work on their own time; during the guaranty period they went to work on the company's time, increasing the number of hours for which we paid, to accomplish the same amount of work. That was particularly true in the maintenance of way department, where the section men's time began from the time they got on the job, during the test period, which might have been four or five miles from their station, whereas this standardization and making of agreements, which did not exist before between the test period and the guaranty period, resulted in paying those men from the time they reported at the section house, until their return to the section house at night. The clerks were organized between those two periods, and whatever proportion of their salaries are included in these expenses, would be affected, because formerly they worked considerable overtime, without any extra compensation, but during the guaranty period they were paid for every minute after the regular hours which they put in. It is not altogether due to inefficiency. Some of it was due to change in working conditions. That defendant's experience showed changes in conditions similar to those described, in all branches of railway maintenance work and that it would actually require a substantially greater amount of labor in the guaranty period than in the test period to perform the same amount of work. That most of defendant's maintenance work is done during the months covered by the guaranty period, March to August, inclusive, Mr. Hill having adopted a rule that all track work and locomotive repairs must be completed by August 1st and

that there would be no opening of track after that date for relaying or inserting of ties, etc., so that the equipment and track would be in shape to move the heavy grain crop upon which the Great Northern depended for its earnings
144 and which began to move about that time; that was the general condition that existed through all the years of the test period as well as the year of the guaranty period.

The witness stated that he had prepared a statement showing defendant's maintenance expenses by months during the years of the test period, the figures being correct and taken from defendant's books.

The statement referred to was offered and received in evidence as defendant's Exhibit F. It showed in detail defendant's maintenance of way expenses and maintenance of equipment expenses separately by months for the test period and also showed the amount of depreciation, insurance and retirements included in these charges to which equation factors should not be applied. It shows that during the six months from March to August, inclusive, on the average during the test period, the total maintenance expenses less charges for depreciation, insurance and retirements were $9,886,664.38, while during the remaining six months of the year, such expenditures averaged only $7,057,684.06. It showed that in percentages 58.36% of these expenses were incurred during the months from March to August, inclusive, while only 41.64% were incurred during the remaining months of the year.

The witness also stated that he had prepared a chart showing graphically the variation in maintenance expenses in the test period according to the figures in Exhibit F.

The chart referred to was offered and received in evidence as defendant's Exhibit G. It consisted of a graph in which horizontal spaces of approximately one inch each represented months and vertical spaces of approximately one-half inch each represented variations of $100,000 commencing with $1,000,000 on the bottom and extending to $2,200,000 on the top line, average monthly maintenance expenditures of the defendant being represented by a variable line which
145 commenced at $1,400,000 for March, rising sharply to nearly $2,200,000 for April and then descending very regularly to slightly over a million dollars in December.

That taking the average test period maintenance expenses for the months of March to August, inclusive, and equating them for changes in prices and property in use, according to

the formula used by the Commission in making its final certificate, instead of starting with half of a year's test period expense as a base, the final allowance would be increased about $4,941,000 more than the Commission allowed.

That the actual maintenance expenses of the defendant during the guaranty period for way and structures and equipment up to and including December 31, 1920 amounted to $28,892,000, and that the amount allowed by the Commission in its final determinations of 1925 and 1926 was $23,815,000.

That the amount allowed for maintenance in calculating this $15,700,000 in February 1921 was $27,233,000.

That at about the time when the partial certificate of February 23rd or March 1st was issued, the witness had
146 some conversation with Mr. Bunting about final settlement; at the presentation of defendant's claim on February 14th, the witness together with other representatives of defendant and with Col. Colston and Mr. Bunting, the witness particularly asked Mr. Bunting as to the method of procedure to obtain funds due defendant on account of the guaranty and was told that defendant could either get final payment at that time which would take about ten days or get an advance which would take approximately the same length of time; that this was when the claim was filed February 14th and before the Commission's representative had studied it, and that Mr. Bunting suggested that it might be in defendant's interest to secure an advance rather than a final payment at that time because there were some items which the Commission was disallowing such as equation on depreciation and retirements which might later be found by the Commission in the carriers' favor and that by securing final settlement at that time, defendant would be compelled to waive those items; that acting on that suggestion, defendant made application for this partial payment.

That as to the testimony of Mr. May and from letters and documents mentioned and introduced by the plaintiff that the defendant revised its returns or estimates of the amount due under the guaranty from time to time after filing its return of February 14, making some revisions as late as 1924 or 1925, the witness stated that the exhibits that have been introduced on that subject would fall in two general classes; one, statements by the carrier covering items audited from time to time, and applying to the guaranty period; and second, data furnished by the carrier at the request of the Commission, such as the order in 1606, together with the carrier's suggested alternatives to the Commission's requirements in

that order. The carrier never at any time adopted the Commission's ideas as its own, but was simply producing
147 evidence based on the Commission's own formula, to produce as favorable an allowance as the facts warranted. In the returns to the Commission under order 1606, where one of the schedules was marked or was headed "Amounts claimed by the carrier" we were particular in making our return, to cross out that statement which the Commission had in its form and insert "The amount shown by exhibit E as required by the Commission"; in other words, producing the evidence on the basis prescribed by the Commission, but not as claimed by the carrier.

That to his knowledge defendant never reached the conclusion that the amount due it under the guaranty was less than the $18,000,000 shown in its return of February 14, 1921.

That the witness' only connection with procuring advances for defendant under Section 209 (h) was to prepare some of the schedules that were filed in the application before the Commission. That the returns of schedules filed in support of application for advances on June 14 and August 1920 were much more meager in their contents than the return of February 14, 1921, the returns for advances covering less than 20 pages of data whereas the return on February 14 contained 119 pages of data, based on defendant's books and in support of its claim for allowance of maintenance. That the returns of June 14th and August 1920 contained no data to support an allowance for maintenance different from defendant's actual maintenance expenses and that they were simply a statement of actual expenditures or estimated income statements for the test and guaranty periods.

Redirect Examination

By Mr. Dorety:

That the heading of the work sheet handed the witness by Mr. May reads: "Great Northern Railway, revised summary, equipment allowance for purposes of estimate for partial payment", and shows [superintendnece,] and allowance for
148 locomotives, freight train cars, passenger train cars, insurance, depreciation and retirements, and deduction to cover possible over-equation of injuries to persons, all of which items are set forth in detail. That with respect to this deduction from equation of injuries to persons, defendant included in maintenance of way and structures and maintenance of equipment expenses, its injuries to persons

in those cases, where the way department or equipment department was responsible for the injuries, and that in making the allowance which they did make in determining the $15,700,000 figure, there was no deduction made from total maintenance expense on account of those injuries to persons, so an amount of $30,000 was deducted in determining this allowance in order to cover possible over-equation of injuries to persons.

That it is correct to state that in making up its claim, defendant applied an equation factor to the test period maintenance expense and applied it to the whole test period expense, including whatever had been spent for injuries to persons and that what the Bureau did was to take out that expenditure for injuries to persons, and then applied no equation factor, so that that particular item of expense would not be equated.

VAL N. WAHLBERG. a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Dorety:

That he lived in St. Paul, was Assistant General Auditor of the Great Northern Railway Company and had been employed by various railroads in accounting and engineering departments for many years principally as assistant engineer in construction and valuation work, assistant valuation accountant in various accounting work, engineer accountant and Assistant General Auditor.

149 Q. I call your attention to the provisions of paragraph C-1 of Section 209 of the Transportation Act which provides that the guaranty shall be one-half of the compensation fixed under the Federal Control Act, but including the increase in such compensation provided for in Section 4 of the Federal Control Act. I also call your attention to the provisions of the last named section, which provides for the allowance of a reasonable per cent to be fixed by the President upon the cost of additions and betterments made during Federal control. It appears in 99 ICC 232, which is one of the exhibits in this case, that we had a claim for some $671,000 for this additional compensation, and that only $474,000 was allowed by the Commission. Will you please state how the amount thus excluded by the Commission was computed?

A. Our claim originally, or as made, amounting to $671,000

was based on the cost of additions and betterments made to the property during the Federal Control Period. The Commission eliminated from these costs all expenditures that had been made prior to January 1st, 1918. There probably were a few other smaller items that I do not think of at the moment, that were also eliminated.

Mr. Collins: May it be understood that this question and answer will come in over my objection as previously made?

The Court: Yes, that is the understanding, and exception allowed.

Q. In other words, where some improvement had been commenced prior to Federal Control, and completed after the beginning of Federal Control, the portion of the cost expended prior to Federal Control was eliminated from your claim, on which interest was computed, by the Commission?

A. Yes.

150 Mr. Dorety: In connection with this claim, may it please the Court I would like to offer this set of correspondence from the files of the Commission. I have a certified copy, certified by the Secretary of the Commission.

The correspondence referred to was offered and received in evidence as defendant's Exhibit H. It included various letters from the Director General of Railroads and from the Interstate Commerce Commission indicating that all amounts expended by the defendant prior to the beginning of Federal Control for additions and betterments completed and put into operation with the approval of the Director General during Federal Control were eliminated by the Interstate Commerce Commission from the amount upon which an interest allowance to the defendant was computed in determining the increases due to defendant in compensation for the guaranty period in accordance with the provisions of Section 4 of the Federal Control Act.

Mr. Collins: I have the same objection to this, also, Your Honor.

The Court: Yes, it will be received with the same understanding.

Q. Have you prepared a statement showing the details of the amounts expended by the Great Northern Railway Company for additions and betterments, the expenditures being made prior to Federal Control, for improvements which were completed and put into operation with the approval of the

President or the Director General, after the beginning of Federal Control, the interest on which was excluded in the Commission's final certificate in the case of the Great Northern Railway Company?

A. I have a statement that shows not only those expenditures that you refer to, but also a large number of other expenditures—the expenditures made by the Director General during the period of Federal Control.

151 Q. That is, it shows not only the portion of the cost to which I have referred, but the complete cost of the improvements in question? A. Yes.

Q. And are they segregated, so that the portions to which I have referred, are shown separately? A. They are.

Q. Is this statement correct, and does it correctly show what it purports to show? A. Yes.

Statement referred to was offered and received in evidence as defendant's Exhibit I. It showed in detail the amounts expended by defendant for additions and betterments upon defendant's line of railway completed and put into operation by the Director General of Railroads during Federal Control, showing separately the portions of such expenditures which were made before Federal Control and those which were made during Federal Control, each being separated as between investment in road and investment in equipment. It showed that at the rate of 4% per annum on investment in road and at the rate of 6% per annum in investment in equipment, both computed upon expenditures made before the commencement of Federal Control as aforesaid, the allowance due to defendant in accordance with the provisions of Section 4 of the Federal Control Act would have been $157,187.53.

152 Mr. Dorety: This is offered in evidence, defendant's Exhibit I.

Mr. Collins: The same objection, and the additional objection that what was done by the Director General is relevant to issues raised in this case.

The Court: It will be received subject to that objection.

Q. In the final claim of the Great Northern Railway Company in Docket 1606, did the company make any claim for any increase in its test period expenses, on account of increased investment due to an increase in its investment in joint terminal companies, which are owned with other companies?

A. That claim was filed as a separate matter really. It was not included in the original return under 1606.

Q. But it was filed in a subsequent supplement? A. Yes.

Q. And was that claim allowed? A. No.

Q. Had the company in fact increased its investment in joint terminal companies between the test period and the guaranty period? A. Yes.

Q. And if interest were allowed on that investment, at the same rate as allowed on other investments of the company, what would the claim amount to?

A. I can't state that separately, but including the increased amount of properties that was added to facilities that were joint with others, the total amount of the claim would be $112,000 approximately.

Q. Was that item excluded by the Commission in making its final certificate? A. Yes.

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153 WILLIAM WYER, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination (By Mr. Dorety.)

That he lived in Cleveland, Ohio, was Secretary and Treasurer of the Missouri Pacific Railroad Company, that in January, 1921, he was assistant superintendent of transportation for the Norfolk-Southern Railway; that in the early part of 1919 he was a clerk in the Operating Statistics Section of the Railroad Administration and in the office of the Financial Assistant to the Director General; that he was also Assistant to the Assistant Director, Division of Operation, in charge of maintenance expenses; that in February 1920, he was appointed Assistant to the Comptroller, United States Railroad Administration in charge of maintenance accounts and organized the maintenance accounts section of the Railroad Administration which had to do with receiving and analyzing carriers' returns under Railroad Administration accounting circulars 101 and 109 on which the Railroad Administration based its accounting computations for maintenance allowance during Federal Control, under paragraph 5 of the standard contract.

Q. What if anything did you have to do with the final settlement of the Norfolk-Southern Railway Company, under Section 209 (g) of the Transportation Act?

Mr. Collins: I renew, Your Honor, my objection to what was done between the Commission and other railroads.

(Arguments of counsel.)

The Court: I will receive the testimony subject to your objection, and allow an exception.

(Question read by the reporter.)

A. The claim for allowance for maintenance expenses during the test period was prepared personally by me, and I also had general supervision over the preparation of the rest of the claim.

154 That the Norfolk-Southern claim was first submitted to the Commission the first week in January 1921; that the Norfolk-Southern made a claim for guaranty period maintenance expenses based on equation of an average six months test period expenses and that the claim was the subject of conferences and discussions between the witness and Commission representatives which conferences lasted about a week or ten days. That the procedure followed by the Commission was to start with the amount of the claim and as the different items were discussed the deductions from or additions to the original amounts were made, and the final figure arrived at was the original claim adjusted by those differences which were determined as they went through the conference, and that was the amount that was certified in final settlement. That there were no deductions from the claim made for maintenance charges. That the Norfolk-Southern filed a return under the Commission's order of October 18, 1920, and it was the claim made in that return concerning which the discussions and conferences mentioned were had. That the claim for increases in prices of wages and materials was made up from the Norfolk-Southern on experience as shown by its records and books and comparing the wage rates that were paid on that road during the test period with those paid during the guaranty period, and the same on the prices of material. As to whether he determined an equation factor representing that road's individual increases in prices of labor and material from the test period to the guaranty period, the witness stated that he determined a number of equation factors which affected the different groups of maintenance expenses from which there could be computed the composite factor,

that the claim, however, was based on a number of individual factors which were applied to the Norfolk-Southern average six months test period expenses. That the
155 Commission allowed that claim in full. That as he understood it, the Commission finally adopted a territorial factor of 2.55 for the railroads in the territory in which the Norfolk-Southern was located; that he did not recall the exact composite factor derived from the Norfolk-Southern expenses but that it was over 3. That he had looked over the Great Northern Railway Company's return of February 14, defendant's Exhibit A in this case and that the Norfolk-Southern return was not as voluminous and did not furnish as much data as was included in the Great Northern Railway Company's return. That during those conferences previously mentioned nor at any other time was he requested to furnish any additional information supporting his claim for maintenance; that the additional information requested concerned the matter of delayed items and unusual expenditures and that on these claims he was requested to submit all his files on the pending claims and to submit balance sheets showing the extent of reserves at both the beginning and the end of the guaranty period; that the Norfolk-Southern had entered reserves in its books, in the guaranty period covering estimated and unaudited items, similar to those which it had been testified that the Great Northern Railway Company entered in its books and that a substantial amount of those estimated and unaudited items were still on his books at the time of final settlement with the Norfolk-Southern. That in making its final certificate the Commission did make some adjustment of those reserves after an examination of his files in connection with the items which he expected to have to pay out of the reserves, that there was one item of approximately $11,000 deducted from the claim on their account. That Norfolk-Southern books had not been checked by the Commission's representatives at any time prior to issuing that final certificate, that is no check of its books had been made with particular reference to guaranty period settlement, although the Commission had made general accounting checks from time to time but not for the guaranty period settlements.

156 That in his return, a claim was made for an allowance for maintenance to reflect increase in wages and prices of material in support of which he furnished data showing the wages paid to various classes of mechanics during the guaranty period and the test period, and the hours they worked, the amounts charged into the accounts for various

classes of material and the quantities represented by those amounts. That the amount of data furnished the Commission on that subject by the Norfolk-Southern was very comparable to the amount furnished by the Great Northern Railway in its return, including the supplemental data which the Great Northern furnished on locomotive repairs and passenger car repairs in response to the Commission's request. That in making its claim for increase in use of freight cars, the Norfolk-Southern assumed that maintenance expense would vary 100% with intensity of use and that the claim was allowed in full by the Commission, although the Commission subsequently reduced that to 60% in its 1606 formula. As to other methods claimed by the Norfolk-Southern, which were allowed in its claim and which the Commission subsequently changed, the witness stated that he assumed that 2/3 of maintenance of way expense was dependent upon the amount of property maintained as measured by the amount of investment in roadway property and that this was later changed by the Commission in its formula to 2/3 of the maintenance expense to be affected by the equated investment in roadway property, the equation being based on the change in general construction cost limits between the two periods under consideration; that is, in the later settlements, the Commission assumed that $100 expended during the high price period would produce less property to maintain than $100 expended in the test period and figured only a percentage of the $100 as representing the increase in property to be maintained; that if the Commission had applied that rule in making the Norfolk-Southern final settlement, it would have reduced the allowance a [a] little. That Norfolk-Southern also
157 used a little higher percentage on proportion of locomotive repairs and passenger car repairs that were affected by use of equipment, using .86 on locomotives, which was later reduced to .8, and using .76 on passenger cars, which was later reduced to .6.

That the Norfolk-Southern had applied during the guaranty period for advances under Section 209 (h) but he was not certain whether the Commission had allowed all the advances in full as applied for; that he was informed that the Commission was not willing to make a proper adjustment until its final determination.

That while he was with the Director General, he participated in conferences between the Director General and members of the Commission regarding the allowance for maintenance to be made under paragraph 5 of the standard contract, some time in May 1920, at which he, the Director General,

the Comptroller for the Railroad Administration, and Commissioners Eastman, Daniels and Meyer, members of Division 4 were present, and they spent the entire afternoon explaining to the Commissioners the formula the Director General was then using in computing maintenance allowances under the contract. That the Commissioners asked a number of questions as to what the Railroad Administration was doing but the bulk of the afternoon was spent in explanations by the witness of the method of allowing maintenance because he was employed in the maintenance section of the Administration.

Cross-Examination (By Mr. Collins.)

Mr. Collins: Before I ask the witness any questions, I want the record to show that the entire testimony is subject to my objection to the Court's lack of jurisdiction to rule on these matters raised, in addition to the other objection.

158 As to whether the Commission used a factor at all in making final settlement with the Norfolk-Southern, the witness stated that it was his understanding that they used the factor that he developed but that no one in the Commission made a direct statement that they were using the specific factor he developed but that his claim was submitted, and he worked with them and there were no changes made in the claim, that the claim was based entirely on those factors and that, therefore, he would certainly say that they used the factor he developed, because they did not tell him to the contrary; that he assumed since the Commission allowed his claim substantially as it was submitted, that they were satisfied with it and the different elements of it and that he assumed also that the Commission used a factor, rather than having definite knowledge, but thought his knowledge was "pretty definite"; that the Commission did make one deduction of $12,000 and some smaller ones on the Norfolk-Southern claim; that the total amount of the claim including advances previously made was approximately $1,325,000. That the Norfolk-Southern operated about 900 miles of road; that he estimated it operated about 200 locomotives at the time its claim was filed with the Commission and that it was a Class I carrier.

VERNON P. TURNBURKE, a witness previously called and sworn on behalf of the defendant, recalled by the defendant, testified as follows:

Direct Examination (By Mr. Dorety, continued.)

That the percentage of bad order freight cars on defendant's line was higher at the end of the guaranty period than it was at the beginning, notwithstanding this large expenditure defendant had made in maintaining those cars, the figures being 7.7% in February, and 8.4% in March, and 8.5% in August, the last month of the guaranty period. That the equipment was in practically the same condition so far as the percentage of bad orders was concerned or certainly
159 was not improved any when the percentage of bad order cars was slightly greater in August than it was in March.

That he did not remember the amount of defendant's claim against the Director General for undermaintenance during Federal Control nor the amount allowed by the Director General on that claim but that the round sum paid defendant by the Director General was many millions of dollars less than it claimed.

(At this point the defendant rested its case)

MORTON T. MAY, a witness previously called and sworn, recalled by the plaintiff in rebuttal, testified as follows:

Direct Examination (By Mr. Collins.)

Q. Mr. May, Mr. Turnburke testified as I recall it, that the Commission did use the carrier's factor of 2.56 or 2.57 in making the partial payment certificate under section 212. Can you state what use if any the Commission did make of that factor developed and submitted by the carrier?

Mr. Dorety: I think that is a mis-statement of Mr. Turnburke's evidence. He said the Commission used the 2.66 factor, or whatever it was, that we had for locomotives and asked for additional data, and on the strength of the additional data, reduced that equation factor and used the equation factor that it thus reduced. I think he said that it did not use the 2.57 factor.

(Arguments of counsel.)

The Court: Well, Mr. May may answer the question.

Mr. Dorety: Exception.

A. I have previously stated that we used the return submitted by the carrier in determining whether we would be justified in certifying the $6,000,000 that they had requested. I have previously testified, that we took that return as filed by the carrier and made certain deductions. After making those deductions there was left a residue. It was not
160 our intention, by doing it that way, to accept the carrier's returns, to accept its factor, or to concede that an ascertainment had been made on that basis. We considered that the data the carrier had supplied us was valuable in assisting us in making the estimate that was necessary to be made at that time.

Q. That factor was in the data though, was it not?

A. That factor was in the data, that is true, but what we did, did not obligate us to the factor.

The Court: (To witness) Well, is it fair to say this, that you neither accepted it nor rejected it?

The Witness: That expresses it Your Honor exactly.

* * * * * * *

Q. Now what have you to say with respect to the question of undermaintenance allowed by the Director General to the Great Northern Railway Company in settlement for the period of Federal control?

A. The Commission possibly has the information. I have not got it at this time, but it is obtainable. I could find out, I am reasonably sure, the amount that the Director General of Railroads paid to the carrier or to the Great Northern Railway Company on account of undermaintenance during the Federal Control Period, provided of course he paid them anything. That would have some effect possibly on the carrier's guaranty period maintenance. It was not given consideration by us, however, at the time this certificate for the $6,000,000 was submitted to the Treasury Department, and neither was it given effect in the determination of the factor, but it is possible that it would have a bearing on the amount of maintenance spent by the carrier during the guaranty period if the question of maintenance is to be opened up and re-decided by some Court or body.

161 Mr. Collins: If the Court please, in that connection I would like to make the statement, that data concerning questions that the witness has just discussed, comes within the Court's indication this morning, that if we feel it neces-

sary that there should be testimony concerning alleged errors of the Commission, that we may then want to submit testimony.

Cross-Examination

By Mr. Dorety:

That he understood that the allowance made by the Director General to defendant for undermaintenance during Federal Control was not considered by the Commission in issuing defendant's final certificate for the guaranty. That in regard to whether the Commission adopted or used an equation factor and whether it took exception to defendant's factor of 2.64 claimed on locomotives because it reflected the ineffectiveness of labor as well as increased wages, the witness could not recall, but said there was no doubt that he would take such exception to that factor and, though he could not be positive, it was very likely that he asked for additional information necessary in considering that feature of the claim; that he did not dispute Mr. Turnburke's testimony that an equation factor different from that which he had made up was made during this conference either by the witness or by Mr. Turnburke under the witness' instructions in the light of this additional data, to follow out the method that the defendant had adopted and was using; and that as to whether he told Mr. Turnburke that, although defendant had an equation factor representing inefficiency of labor, it would have to furnish material for an equation factor which would not reflect anything but increase in wages for repairs on locomotives, the witness stated that he probably did so state to defendant's representative, in order to make the form complete and that he probably used it on the locomotives in determining
162 what it would be with that change, but that he did not at that time intend to obligate himself to that form or that factor at all.

As to whether he was the person who determined how these claims should be audited or got his instructions from some one superior, his instructions all came from his superiors so far as his calculations were concerned, and that what he did was to make calculations in every case in accordance with those instructions and then his calculations went to his superior officer who ultimately passed on them and who in turn reported to the Director of the Bureau, and the Director reported to Division 4, and that every person to whom those figures came had the same information that the witness had. That in other words, he was not the one who reached the ultimate conclusion.

Cross-Examination

By Mr. Dorety:

Q. Mr. May, this balance of $15,700,000 that appeared on this work sheet that Mr. Turnburke testified about, and which appears in your exhibit 9 as the residue that was left after these deductions, is the same figure that is later mentioned in the communication from the Bureau to Division 4 as being the amount left after making these various specific deductions, isn't it?

A. It seems that incidentally the figures were the same all the way through. The statement was headed that way, indicating that it was an estimate, so that was just an estimate and did as you state, represent the residue of the claim after these specific deductions had been made.

Mr. Collins: The plaintiff rests.

Mr. Dorety: The defendant rests.

163 The Court: Testimony closed. Let the record show that each party makes a motion for judgment on the sole ground that the evidence will support no other conclusion, and that it is understood that the party whose motion is denied will be allowed an exception to that denial; otherwise the question of sufficiency of the evidence is not in the record.

Mr. Collins: Yes.

Mr. Dorety: All right.

(Arguments of counsel to the court.)

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164 Decision.

The Court: (Orally) It seems to me that perhaps the most important thing in this case is to have it decided as promptly as it can be, because it is apparent that the decision of this Court will not be the final decision. I gave the construction of the Statute in question here much consideration at the time the demurrer was argued, and stated my views with respect to it in the order sustaining the demurrer. There is no very great dispute as to the facts in this case, and no very great dispute as to the general rules of law. The difficulty as I see it, is to apply the law to the facts and to

determine the proper construction of the Statute involved. I think it is as well that I should decide the case at this time. I will reserve the right, of course, to add to or take away from what I may say here, because I may not be able to state, as accurately or as fully as I would like to my conclusions.

The Great Northern Railway Company was a carrier entitled to the guaranty provided for by Section 209 of the Transportation Act of 1920, (41 Stat. 464). It received in advances during the guaranty period, from March 1st, 1920 to September 1st, 1920, $6,500,000 under the provisions of Section 209 (h). On March 1st, 1921, it received $6,000,000 additional under Section 209 as amended by Section 212 which became effective February 26, 1921, (41 Stat. 1145). Thereafter, on June 17, 1925, the Interstate Commerce Commission issued a final certificate determining that the Great Northern Railway Company was entitled to $11,198,887.31 in satisfaction of the guaranty, and on June 8, 1926, issued an amended final certificate as the result of a re-hearing, fixing the amount of $11,170,214.02, which indicated that the railway company had received approximately $1,300,000 more than it was entitled to as a result of the partial payment made on March 1st, 1921.

165 The Government took the position that it was entitled to recover that amount from the railway company, and it brought this suit. The complaint first set up the payment to the railway company, and the issuance of the final certificate, and asked for judgment for the difference. The railway company demurred to the complaint, and the Court sustained the demurrer, on the theory that the mere issuance of the final certificate for less than the amount of prior payments, in view of the issuance of the certificate for the partial payment did not entitle the Government to recover.

The Government was granted leave to amend its complaint, which it subsequently did, alleging that the claimed overpayment resulted from a mistake on its part. It appears that shortly prior to the issuance of the partial certificate under Section 212, there had been issued to the Great Northern Railway Company, at its request, a certificate that it was entitled to $6,000,000, that certificate being issued for the purpose of credit, it being the theory apparently of the railway company, and the Interstate Commerce Commission, that the certificate might be used as a basis for borrowing money from the railway company's bankers. That certificate was based upon a return made by the railway company on February 14, 1921, which gave in detail the facts and figures upon

which the railway based its claim for the amount which was due it under the guaranty. That return indicated that the railway company was entitled all together to approximately $18,000,000.

The return was audited by the auditors for the Commission and certain items which in their judgment obviously could not be allowed, were eliminated, and other items left. That resulted in a reduction of the amount of the claim from approximately $18,000,000 to about $15,500,000. The company had already received as advances, $6,500,000, and it was deemed safe by the Commission to certify that it was entitled to an additional payment of $6,000,000.

166 Before this certificate issued for the purpose of credit had been used, and on February 26th, 1921, Section 212 was enacted into law and thereupon the Great Northern Railway Company applied for a certificate under the provisions of that Section, and the Commission issued such a certificate, and the railway company procured its $6,000,000 from the United States Treasury.

The Government's claim is that that certificate was issued in the same manner as former certificates for advances under paragraph (h) of Section 209, and with no more careful examination of the return than was made with respect to such certificates; that the Commission at that time had more work than could properly be done; that the accounting department was overburdened, and that, while such attention was given to the matter as could reasonably be given under the circumstances, it was not such an examination or audit or determination as should have been made in view of the provisions of Section 212, which called for a definite ascertainment.

The contention of the railway company is that no such mistake could be attributed to the making out of this certificate for partial payment under Section 212, as would authorize the Court to find that it was not properly issued in accordance with the provisions of that Section, or would render it ineffective for the purpose for which it was issued. It is also the claim of the railway company that no abuse of authority on the part of the Commission is shown, and that there is no showing that the Commission violated any law or exceeded its authority in issuing the certificate as it did.

I should also have said that it had been the contention of the Government, and still is its contention, that while Section 212 amended Section 209, it did not do away with the neces-

sity of a final certificate, and did not avoid the effect which the final certificate was intended to have under the provisions of Section 209. It is further the contention of the Government that, in view of the fact that the Commission
167 finally determined that the railway company was not entitled to $12,500,000 which it had received, but was entitled to an amount of about $1,300,000 less than that, the Government is entitled to recover that amount back, either upon the theory that it was paid to the railway company through a mistake, or that the Commission exceeded its powers in issuing the certificate, and the railway company thereby received $1,300,000 which under the law it was not entitled to.

There is no question but that, under the law, where money is paid by the Government to a person who is not entitled to receive it, it may be recovered back. There is no doubt either that where an officer of the Government pays out money which he has no authority to pay out, the money can be recovered from the person who receives it.

My views are influenced to some extent by the situation which existed at the time the law in question was enacted, and the contingency which it was intended to meet. It was recognized by Congress that something must be done for the railroads at the time they were turned back to private ownership. They had suffered a great deal under the Government administration through increases in wages and in the cost of goods, and in other ways. Their cars were scattered all over the United States. Nobody knew exactly what the future held for the railroads, and it was feared that, unless something was done, a great many of them would have to go into receivership and be administered by the courts for a more or less indefinite period. Congress enacted the Transportation Act, and the purpose of Section 209 was to guarantee to the carriers that during the six months period specified their earnings would be equal to one-half of the amount which they were entitled to as compensation under the Federal Control Act, provided they accepted the provisions of
168 Section 209. The scheme was to have the Interstate Commerce Commission, as soon as practicable, make a definite ascertainment, in the case of each railroad, of the amount of the guaranty. It was apparent that the railroads, or some of them, would need to secure money prior to the time that any such final determination could be made, and so it was provided that advances might be made to the railroads from time to time during the guaranty period, for the purpose of enabling them to meet their necessary expenditures.

It was provided, however, that if excessive amounts were advanced to them, they should be obligated to return the excess and to secure its repayment to the Government.

After the expiration of the guaranty period, it was discovered that the Commission was powerless to make any certificates which would entitle the railroads to receive any partial payments on the amount of the guaranty, although it might be known to the Commission that definite amounts were due. It was also discovered that advances could no longer be made, because the law only authorized advances during the guaranty period. However, there was at that time a very large amount known to be owing to the railroads under the provisions of Section 209, and there was no way of getting any of this money into their hands until such time as the Interstate Commerce Commission should be able to make these final certificates.

To meet that situation, and apparently with the support of the Commission, or at the instance of the Commission, Congress passed Section 212, which enabled the Commission to issue certificates for partial payments. That provided as follows:

169 "In making certifications under Section 204, or Section 209, the Commission, if not at the time able finally to determine the whole amount due under such section to a carrier or the American Railway Express Company, may make its certificate for any amount definitely ascertained by it to be due, and may thereafter in the same manner make further certificates, until the whole amount due has been certified. * * * In ascertaining the several amounts payable under either of such sections, the Commission is authorized, in the case of deferred debits and credits which cannot at the time be definitely determined, to make, whenever in its judgment practicable, a reasonable estimate of the net effect of any such items, and, when agreed to by the carrier or express company, to use such estimate as a definitely ascertained amount in certifying amounts payable under either of such sections, and such estimates so agreed to shall be prima facie but not conclusive evidence of their correctness in amount in final settlement."

On examining the question as to the effect of Section 212, it is apparent to me that Congress had abandoned this scheme of requiring the railroads to apply for advances, and to be obligated to repay the excess of those advances, that partly upon the theory that it was an unsatisfactory way for the railroads to secure money. It was not money to

which they were absolutely entitled, and in a sense they were required to set up a sort of contingent liability because of the possibility of having to repay some portion or all of the advances made. The representations which were made to Congress were apparently that it was possible for the Commission to determine definitely that certain amounts were due the railroads, that the Government was obligated to the railroads to pay all amounts which could be definitely ascertained, and that, while it was entirely possible that the Commission might make some mistakes in connection with the issuance of partial payment certificates, it was best to entrust them with that power, and it was reasonable to suppose that they could exercise it without any considerable damage to the Government, and with great benefit to the railroads, many of which were in distress.

It was proposed to amend that law to place these
170 partial payments on substantially the same basis as advances under Section 209 (h), and that amendment was voted down.

It is always questionable as to how much effect the debates in Congress and the reports of the committees have upon the construction of any law, but in this particular instance it seems to me that the intent can be found in the language of the law itself. I think it shows a change in policy with respect to the payment of the guaranty. The first plan was to wait until the Commission could make its final determination, carrying the railroads along in the meantime by making these advances, which they might be obligated to repay. Section 212 changed that plan, and substituted the plan of paying to the railroads as fast as definite determination could be made, the amounts definitely ascertained by the Commission to be due.

The first question to be determined here is, whether, under the evidence presented by the Government, the Court would be justified in finding that a mistake had been made in the issuance of the partial certificate of March 1st. The Government in making its contention is still relying upon the theory that the final certificate of the Commission must be taken as having more weight than the partial certificate, and as indicating the correct amount which the carrier was entitled to under Section 209. In the absence of Section 212, there could be no question as to that, but if my theory as to the proper construction of Section 209, as amended by Section 212, is right, the two certificates stand upon an equality, and the final certificate is no more evidence of the amount due under the guaranty than the certificate issued

under Section 212 is evidence of the correct amount which was definitely ascertained to be due on March 1st, 1921.

171 There is, of course, a strong presumption that a public official or a public body performs a duty in accordance with the law, and a strong presumption as to the regularity of any official proceeding. I do not think that under the law this Court would have any right to question or determine the correctness of the Commission's findings, either on March 1st, 1921, or at the time the final certificate was issued; in other words, the determination of what amount could be definitely ascertained to be due on March 1st was wholly a question for the Commission, just as the question as to what the amount of the final certificate should be was entirely a question for the Commission. Apparently the only mistake which was made by the Commission at the time the partial certificate was issued was in failing to realize that at some subsequent period there might be a change in the factors or the formula to be used in determining the amount of certain items of the return.

There were, however, no false figures furnished by the railway company. The Commission was at all times aware as to just what the claims of the railway company were, and as to what formula and what factors it was using in making up its return. The Commission, as I stated before, disallowed certain items which it decided could not be properly allowed, and finally reached the conclusion that it was safe in allowing the railroad company to have the $6,000,000 which was included in the certificate, in partial payment.

I think that on the evidence in this case the Court would not be justified in finding that the Commission committed any such error or mistake as would invalidate the certificate issued. Under section 209 the whole question as to the determination of the partial payment and the amount due under the guaranty was left to the Interstate Commerce Commission, which Congress assumed would be best qualified to determine the question of the amount which

172 the railroad should receive, either in partial payment or in final payment under the provisions of the act. I think the finding, upon the record here, must be that the certificate issued on March 1st, to the Great Northern Railway Company, was the Commission's determination at that time of the amount which it definitely ascertained to be due the Railway Company, and which therefore was due it.

As to the lack of authority in the Commission to issue that certificate, this may be said: There was no limitation in sections 209 or 212 upon the Commission's authority to determine what was due. Congress in the enactment of Section 212 was relying upon the Commission to exercise sound judgment and discretion in the issuance of the certificates provided for. It did nothing to tie the hands of the Commission. There is nothing in the act which fixed any degree of diligence to be used by the Commission or fixed any limit of time within which the determination must be made. The Commission was not obligated to issue any certificate at all for a partial payment, and it could fix any margin of safety that it desired. Where, with the facts before it, the Commission reached the conclusion that the railway company was entitled to a certain amount and issued its partial certificate therefor, it would be neither just nor reasonable that the government should be permitted to claim a mistake or lack of authority because thereafter the Commission changed its method of determination by adopting the use of different factors or formulae for calculating the amount of certain items as to which there could properly be a wide difference of opinion.

In most of the tax cases, which have been referred to by the government, the law definitely determined the amount of the tax or at least fixed a measure by which it could be definitely determined, and of course a determination
173 by an official of an incorrect amount would not bind the government. The government was entitled to the full amount of the tax as fixed by the law.

If it could be shown here that as a fact the Great Northern Railway Company actually received $1,300,000 more than the Commission had any authority to award to it, then the Government would be in a position to recover that $1,300,000, but the record in this case indicates that there was before the Commission abundant evidence upon which it might properly have determined that the railroad was entitled to the amount certified in the partial certificate of March 1st, and the Commission did make that determination.

I am not holding that the final certificate of the Commission was incorrect, but I am saying that upon the material and the data and the figures which were before it it was well within the discretion of the Commission to have allowed the partial payment which it did allow. It also was probably well within the discretion of the Commission to make the final certificate later on for a lesser amount, on the data before it at that time. It seems quite obvious that the dif-

ficulties which the Commission and the railroads were having in finding the proper formula or factor to be used in determining the amount of the guaranty arose out of the tremendous increase in the cost of labor and material which had occurred between the test period and the guaranty period, and that as to what constituted the proper factor or formula there could be and was much honest controversy.

It is my opinion, whether right or wrong, that it was within the authority of the Commission to make the determination which it did make on March 1st, 1921, and that the evidence does not show that it did that by reason of any mistake occurring at that time, and that the fact that it subsequently came to the conclusion some four or five years later that the amount that the railroad was entitled to was some $1,300,000 less, does not invalidate the certifi-
174 cate for partial payment, and does not entitle the Government to recover the $1,300,000 which was paid to the railroad at that time. I am not entirely certain that I have stated my position intelligently. I find generally in favor of the defendant, that it is entitled to judgment that the plaintiff take nothing by this action. Judgment may be entered accordingly. The plaintiff is allowed an exception to the findings and order for judgment, and to the denial of its motion for judgment made on the sole ground that the evidence will support no other conclusion. A 42-day stay is granted as a matter of course. Since the period for appeal is three months, the government may have a stay of execution of judgment for that period if it desires.

175 Gov't. Exhibit 1—p. 1.

Interstate Commerce Commission.
Washington

Certificate No. A-65.
(Application No. A-77.)

(Bureau of Finance Oct. 21, 1920 for file in Finance Docket No. 501.)

Certificate of Interstate Commerce Commission Under Section 209 (h), Transportation Act, 1920.

To the Secretary of the Treasury of the United States:

The Interstate Commerce Commission hereby certifies that the

Great Northern Railway Company

a corporation of the State of Minnesota, hereinafter termed the company, is a carrier as defined in subdivision (a) of Section 209 of the Transportation Act, 1920; that the company filed with the said Commission, on or before March 15, 1920, a written statement that it accepted all of the provisions of the said Section 209; that thereafter the company made application to the said Commission asking that during the guaranty period there might be advanced to it a certain sum or sums to enable it to meet its fixed charges; that the said Commission has made investigation in the premises; that the following sum, or the aggregate of the following sums, together with any other sum or sums heretofore advanced to the company under said Section 209, is not in excess of the estimated amount necessary to make good the guaranty of the United States to the company under the provisions of said section and is necessary to enable the company to meet its fixed charges and that an advance, or advances, shall be made to the company in the amount, or amounts, and at the time, or times, as specified below, namely:

Three million dollars ($3,000,000) June 26, 1920.

Dated this 26th day of June, 1920.

By the Commission,
Division 4.

GEORGE B. McGINTY,
Secretary.

176 Gov't. Exhibit 1—p. 2.

Interstate Commerce Commission.
Washington

Certificate No. A-225
(Application No. A-212)

(Bureau of Finance. Oct. 21, 1920. For file in Finance Docket No. 501.)

Certificate of Interstate Commerce Commission Under Section 209 (h), Transportation Act, 1920.

To the Secretary of the Treasury of the United States:

The Interstate Commerce Commission hereby certifies that the

Great Northern Railway Company

a corporation of the State of Minnesota, hereinafter termed the company, is a carrier as defined in subdivision (a) of Section 209 of the Transportation Act, 1920; that the company filed with the said Commission, on or before March 15, 1920, a written statement that it accepted all of the provisions of the said Section 209; that thereafter the company made application to the said Commission asking that during the guaranty period there might be advanced to it a certain sum or sums to enable it to meet its operating expenses; that the said Commission has made investigation in the premises; that the following sum, or the aggregate of the following sums, together with any other sum or sums heretofore advanced to the company under said Section 209, is not in excess of the estimated amount necessary to make good the guaranty of the United States to the company under the provisions of said section and is necessary to enable the company to meet its operating expenses; and that an advance, or advances, shall be made to the company in the amount, or amounts, and at the time, or times, as specified below, namely:

Two million dollars ($2,000,000) August 31, 1920.

Dated this 31st day of August, 1920.

By the Commission,
Division 4.

GEORGE B. McGINTY,
Secretary.

177 Gov't. Exhibit 1—p. 3.

Interstate Commerce Commission.
Washington

Certificate No. A-276
(Application No. A-212)

(Bureau of Finance. Nov. 6, 1920. For file in Finance Docket No. 501.)

Certificate of Interstate Commerce Commission Under Section 209 (h), Transportation Act, 1920.

To the Secretary of the Treasury of the United States:

The Interstate Commerce Commission hereby certifies that the

Great Northern Railway Company,

a corporation of the State of Minnesota, hereinafter termed the Company, is a carrier as defined in subdivision (a) of Section 209 of the Transportation Act, 1920; that the company filed with the said Commission, on or before March 15, 1920, a written statement that it accepted all of the privisions of the said Section 209; that thereafter the company made application to the said Commission asking that during the guaranty period there might be advanced to it a certain sum or sums to enable it to meet its operating expenses; that the said Commission has made investigation in the premises; that the following sum, or the aggregate of the following sums, together with any other sum or sums heretofore advanced to the company under said Section 209, is not in excess of the estimated amount necessary to make good the guaranty of the United States to the company under the provisions of said section and is necessary to enable the company to meet its operating expenses; and that an advance, or advances, shall be made to the company in the amount, or amounts, and at the time, or times, as specified below, namely:

One million, five hundred thousand dollars ($1,500,000), November 4, 1920.

Dated this 4th day of November.
By the Commission,
Division 4.

GEORGE B. McGINTY,
Secretary.

178 (Gov't Ex 1—page 4)

Finance Docket No. 501

Interstate Commerce Commission
Washington

Certificate No. A-328

Certificate of Interstate Commerce Commission Under Section 209(g), Transportation Act, 1920.

To the Secretary of the Treasury of the United States:

1. The Interstate Commerce Commission, hereinafter called the Commission, hereby certifies that the Great Northern Railway Company, a corporation of the state of Minnesota, hereinafter called the carrier, is a carrier as defined in paragraph (a) of section 209 of the Transportation Act, 1920, in that it is a carrier by railroad whose railroad or system of transportation was under Federal control at the time such Federal control terminated at 12:01 A. M. on March 1, 1920; that the carrier filed with the Commission on or before March 15, 1920, a written statement that it accepted all of the provisions of the said section 209.

2. The Commission has ascertained and hereby certifies to the Secretary of the Treasury that the amount of six million dollars ($6,000,000) in addition to any other sum or sums heretofore certified in favor of the carrier under section 209 of the Transportation Act, 1920, is necessary to make good to said carrier the guaranty provided by the said section.

3. The Commission hereby certifies that such amount of six million dollars ($6,000,000) cannot be reduced by further accounting or otherwise, and there may be, upon further investigation, additional amounts found due to said Great Northern Railway Company to make good to said carrier the guaranty of section 209 of the Transportation Act, 1920, and which if, and when, ascertained by the Commission will be certified to the Secretary of the Treasury.

Dated this 23rd day of February, 1921.

By the Commission,
Division 4.

(Seal.)

GEORGE B. McGINTY,
Secretary.

Delivered to Mr. Hughes, L. R. Smith 2-23-21.

179 Gov't. Exhibit 1—p. 4a

Finance Docket No. 501
February 23, 1921.

Hon. D. F. Houston,
Secretary of the Treasury,
Washington, D. C.

My dear Mr. Secretary:

You are advised that the Great Northern Railway Company is in urgent need of financial assistance and in order to meet its current obligations the company has applied for a partial payment under the guaranty provided under section 209 of the Transportation Act, 1920, intending, as we are advised, to use the Commission's certificate as a basis of credit with the bankers.

In view of these circumstances we have issued and are forwarding to you, through the regular channels, a certificate for partial payment in favor of the Great Northern Railway Company, such as has already been issued in favor of the Grand Trunk Western and other companies. It is our understanding that the certificate issued in favor of the Great Northern Railway Company is not requested for the purpose of making a test of the law as was the case in respect of the certificate issued in favor of the Grand Trunk Western, but that the present certificate is desired purely for use as the basis of credit with this company's bankers.

Very truly yours,

/S/ B. H. MEYER,
Chairman, Division 4.

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180 Gov't Exhibit 1—p. 4b.

Finance Docket No. 501

Interstate Commerce Commission
Washington

Certificate No. A-328-B

Certificate of Interstate Commerce Commission Under Section 209 (g) Transportation Act, 1920.

To the Secretary of the Treasury of the United States:

The Interstate Commerce Commission hereby cancels its certificate Number A-328, dated February 23, 1921, which certified to the Secretary of the Treasury of the United States

a payment of Six million dollars ($6,000,000) to the Great Northern Railway Company, under paragraph (g) of Section 209 of the Transportation Act, 1920, a copy of which certificate is hereto attached.

Dated this 1st day of March, 1921.

By the Commission,
Division 4.

GEORGE B. McGINTY
Secretary.

Delivered to Mr. Hughes
LE ROY SMITH 3/1/21

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181 Gov't. Exhibit 1—p. 5.

Finance Docket No. 501

Interstate Commerce Commission
Washington

Certificate No. A-329

Certificate of Interstate Commerce Commission Under Section 209(g), Transportation Act, 1920, as Amended by Section 212.

To the Secretary of the Treasury of the United States:

1. The Commission hereby certifies that it has this date cancelled certificate No. A-328, dated the 23rd day of February, 1921, which certified to the Secretary of the Treasury of the United States a payment of Six million dollars ($6,000,000) in favor of the Great Northern Railway Company.

2. The Interstate Commerce Commission, hereinafter called the Commission, hereby certifies that the Great Northern Railway Company, a corporation of the state of Minnesota, hereinafter called the carrier, is a carrier as defined in paragraph (a) of section 209 of the Transportation Act, 1920, in that it is a carrier by railroad whose railroad or system of transportation was under Federal control at the time such Federal control terminated at 12:01 A. M. on March 1, 1920; that the carrier filed with the Commission on or before March 15, 1920, a written statement that it accepted all of the provisions of the said section 209.

3. The Commission has ascertained and hereby certifies to the Secretary of the Treasury that the amount of Six million dollars ($6,000,000) in addition to any other sum or sums

heretofore certified in favor of the carrier under section 209 of the Transportation Act, 1920, is necessary to make good to said carrier the guaranty provided by the said section.

4. The Commission hereby certifies that such amount of Six million dollars ($6,000,000) cannot be reduced by further accounting or otherwise, and there may be, upon further investigation, additional amounts found due to said Great Northern Railway Company to make good to said carrier the guaranty of section 209 of the Transportation Act, 1920, and which if, and when, ascertained by the Commission will be certified to the Secretary of the Treasury.

Dated this 1st day of March, 1921.

By the Commission,
Division 4.

GEORGE B. McGINTY,
Secretary.

del'd to Mr. Hughes
LE ROY SMITH 3/1/21

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182 Gov't. Exhibit 1—p. 6.

Great Northern Railway Company
Executive Department

(Bureau of Finance. Feb. 23, 1921. For file in Finance Docket No. 501.)

Ralph Budd,
President.

St. Paul, Minn.

At Washington, D. C., February 16, 1921.

Hon. W. A. Colston,
Director, Division of Finance,
Interstate Commerce Commission,
Washington, D. C.

Dear Sir:

Below I am giving an estimate of Great Northern Railway Company's cash requirements from February 1 to March 15, 1921, from which it will be observed we will require $5,520,000.00 additional cash.

Cash Requirements to March 15, 1921

	Receipts	Disbursements
Available cash February 1, 1921	$ 3,180,000.	
Estimated receipts February 1921	7,500,000.	
Estimated receipts first half March 1921	4,000,000.	
Unpaid vouchers February 1, 1921		$ 1,100,000.
Disbursements February 1921		12,100,000.
Disbursements first half March 1921		5,000,000.
Working Fund		2,000,000.
Total	$14,680,000.	$20,200,000.
Additional cash required to March 15, 1921		$ 5,520,000.

The principal obligations which we must meet between now and March 15 are taxes and our payrolls. Three million dollars of taxes fall due February 28 and March 1, and approximately one million dollars more during March.

In order to meet these obligations, we must obtain an advance on account of the Guaranty period, and Great Northern Railway Company hereby applies for certificate of indebtedness in the amount of $6,000,000.00.

If the pending Winslow Bill shall have become law by about February 24, we would, of course, be able to obtain cash on the certificate from the U. S. Treasury. If it has not become law, we would then be compelled to use a copy of the certificate of indebtedness as collateral for a bank loan, which I feel we would have to negotiate not later than February 24, 1921.

If necessary to communicate with me concerning this matter, I can be reached at Great Northern Ry. Co. office, 32 Nassau Street, New York City, balance of this week, and I will be in Washington next week and will call at your office.

Yours very truly,

RALPH BUDD

183 Gov't. Exhibit 1—p. 7.

Washington, D. C.,
February 25, 1921.

(Bureau of Finance. Mar. 1, 1921. For file in Finance Docket No. 501.)

Hon. W. A. Colston,
Director, Division of Finance,
Interstate Commerce Commission,
Washington, D. C.

Dear Sir:

Confirming our conversation this morning I desire on behalf of the Great Northern Railway Company to request that a check be made of the Great Northern's claim for settlement under the Guaranty Period to the end that final settlement may be made as promptly as practicable.

If there is any way in which we can assist in expediting this check I hope that you will have your accounting forces call upon us and in order that there may be no delay in such matter, our Mr. V. P. Turnburke is remaining at Washington and will be at the Hotel Powhatan.

Yours very truly,
RALPH BUDD
President.

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184 Gov't. Exhibit 1—p. 8.

(Interstate Commerce Commission. Received Mar. 1, 1921. Bureau of Mails and Files.)

(Bureau of Finance. Mar. 7, 1921, For file in Finance Docket No. 501.)

At Washington, February 28, 1921.

Hon. W. A. Colston,
Director, Division of Finance, I. C. C.,
Washington, D. C.

Dear Sir:

On February 23 the Interstate Commerce Commission issued certificate No. A-328—Finance Docket 501—in amount of $6,000,000 in favor of the Great Northern Railway Com-

pany on account of the guaranty period. It was necessary to borrow funds temporarily upon an agreement based on this certificate. Now that the law has been amended, I desire to obtain a new certificate of indebtedness in the same amount in order to secure the funds from the United States Treasurer and pay off the temporary loan as per my agreement to do so as early as possible, and am also anxious to pay this loan in order to save the interest thereon which is a considerable amount daily.

Great Northern Railway Company, therefore, hereby applies for a new certificate of indebtedness on account of the guaranty period in the amount of $6,000,000, to be issued in lieu of its certificate No. A-328, above referred to, issued February 23, 1921.

Yours truly,

RALPH BUDD
President.

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185 Gov't. Exhibit 1—p. 9

Request for Final Settlement

St. Paul, Minn.,

June 13, 1922.

To the Interstate Commerce Commission,
Washington, D. C.

In accordance with authority conferred upon him by the Executive Committee of the Board of Directors of Great Northern Railway Company at a meeting held in St. Paul on the twenty sixth day of January 1922, (a certified copy of the resolution adopted at said meeting is hereto attached) the undersigned requests a final settlement on behalf of the Great Northern Railway Company under the guaranty provisions of Section 209 of the Transportation Act, 1920, and sets forth the net effect of deferred debits and credits for which an estimate and determination in accordance with the provisions of paragraph (b) of Section 212 of said act are requested.

The claim of the Great Northern Railway Company is for a total amount due under the guaranty of said Section 209 of the Transportation Act, 1920, including adjustments and allowances as provided in paragraph (b) of said Section 212

of said act, of $17,599,756.42, subject to credits for advances and partial payments amounting to $12,500,000.00, resulting in a net amount due to the Great Northern Railway Company under the provisions of said Sections 209 and 212 of said Transportation Act, 1920, of $5,099,756.42, all of which is more particularly set forth in Exhibit A hereto attached, and supplement thereto.

Pursuant to your order dated December 15, 1921, the carrier submits herewith final return showing separately the amounts due under the guaranty provisions of said Section 209 and 212 of the Transportation Act, 1920, with adjustments of charges to operating expenses for maintenance of way and structures and for maintenance of equipment according to the increase in the general level of cost of material and labor in the territory within which the lines of railway of respondent are located, to the best knowledge and belief of your petitioner.

GEO. H. HESS JR. Comptroller.
For Great Northern Railway Company.

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186 Gov't. Exhibit 1—p. 10

Interstate Commerce Commission
Washington

Finance Docket No. 510
Certificate No. A-1041

Certificate of Interstate Commerce Commission Under Section 209 (g), Transportation Act, 1920.

To the Secretary of the Treasury
of the United States:

1. The Interstate Commerce Commission, hereinafter called the Commission hereby certifies that the Great Northern Railway Company, a corporation of the State of Minnesota, The Farmers' Grain & Shipping Company, a corporation of the State of North Dakota, and The Watertown & Sioux Falls Railway Company, a corporation of the State of South Dakota, hereinafter called the carriers are carriers as defined in paragraph (a) of section 209 of the Transportation Act, 1920; and that the carriers filed with the Commission on or before March 15, 1920, written statements that they accepted all of the provisions of said section 209 and that the

two companies last mentioned individually filed with the Commission resolutions passed by their respective boards of directors authorizing the Great Northern Railway Company to act as their agent in effecting settlement under said section 209 and to receive payment of any sum or sums due them thereunder; said companies being under common control through direct or indirect ownership of their capital stock and composing a single system of transportation.

2. The Commission has ascertained, and hereby certifies to the Secretary of the Treasury that the amount of eleven million, one hundred and seventy-eight thousand, eight hundred and eighty-seven dollars and thirty-one cents ($11,178,887.31) is the amount necessary to make good to said carriers the guaranty provided by section 209 of the Transportation Act, 1920.

3. The Commission has heretofore certified to the Secretary of the Treasury as advances under section 209 (h) an aggregate amount of six million five hundred thousand dollars ($6,500,000) as follows:

Certificate No. 65	June 25, 1920	$3,000,000
Certificate No. 225	August 31, 1920	2,000,000
Certificate No. 276	November 4, 1920	1,500,000

and as partial payment under section 209 (g) as amended by section 212, an amount of six million dollars ($6,000,000) on March 1, 1921, under certificate No. A-329.

4. The Commission hereby certifies that the amount due the United States on account of overpayment to the carrier under section 209 (h) is one million, three hundred and twenty-one thousand, one hundred and twelve dollars and sixty-nine cents ($1,321,112.69).

5. The Commission has made final determination as aforesaid of the amount of the guaranty provided for by section 209 of the Transportation Act, 1920.

Dated this 17th day of June, 1925.

By the Commission,
Division 4.

GEORGE B McGINTY
Secretary.

187 Gov't. Exhibit 1—p. 11.

Interstate Commerce Commission
Washington.

Finance Docket No. 501. (This certificate also embraces Finance Dockets 463 and 879.)

Amended Certificate No. A-1041.

Amended Certificate of Interstate Commerce Commission Under Section 209 (g), Transportation Act, 1920.

(Cancels Certificate No. A-1041 dated June 17, 1925.)

To the Secretary of the Treasury of the United States:

1. The Interstate Commerce Commission, hereinafter called the commission, hereby certifies that the Great Northern Railway Company, a corporation of the State of Minnesota, The Farmers' Grain & Shipping Company, a corporation of the State of North Dakota, and the Watertown & Sioux Falls Railway Company, a corporation of the State of South Dakota, hereinafter called the carriers are carriers as defined in subdivision (a) of section 209 of the transportation act, 1920; and that the carriers filed with the commission on or before March 15, 1920, written statements that they accepted all of the provisions of said section 209 and that the two companies last mentioned individually filed with the commission resolutions passed by their respective boards of directors authorizing the Great Northern Railway Company to act as their agent in effecting settlement under said section 209 and to receive payment of any sum or sums due them thereunder; said companies being under common control through direct or indirect ownership of their capital stock and composing a single system of transportation.

2. The commission has ascertained, and hereby certifies to the Secretary of the Treasury, that the amount necessary to make good to said Great Northern Railway Company the guaranty provided by section 209 of the transportation act, 1920, is eleven million, one hundred and seventy thousand, two hundred and fourteen dollars and two cents ($11,170,-214.02); that the amount necessary to make good said guaranty to said Farmers' Grain & Shipping Company is thirty-one thousand, four hundred and eighteen dollars and eighty-eight cents (31,418.88); and that the amount necessary to make good said guaranty to the said Watertown & Sioux

Falls Railway Company is seventy-five thousand, six hundred and ninety-eight dollars and eighty-nine cents ($75,698.89).

3. The commission has heretofore certified to the Secretary of the Treasury as advances under section 209 (h) to said Great Northern Railway Company an aggregate amount of six million, five hundred thousand dollars ($6,500,000), as follows:

Certificate No. 65,	June 25, 1920	$3,000,000
Certificate No. 225,	August 31, 1920	2,000,000
Certificate No. 276,	November 4, 1920	1,500,000

and as partial payment to said Great Northern Railway Company under section 209 (g), as amended by section 212, an amount of six million dollars ($6,000,000) on March 1, 1921, under Certificate No. A-329.

4. The commission has made final determination as aforesaid of the amount of the guaranty provided for by section 209 of the transportation act, 1920.

GEORGE B. McGINTY
Secretary.

Dated this 8th day of June, 1926.

By the commission.

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188 Gov't. Exhibit 2.

Interstate Commerce Commission.
Washington.

At a session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 18th day of October, A. D. 1920.

In the Matter of Settlements With Carriers Under the Provisions of Section 209 of the Transportation Act, 1920.

Whereas, Under the provisions of section 209(g) of the transportation act, 1920, this Commission is charged with the duty of ascertaining and certifying to the Secretary of the Treasury as soon as practicable after the expiration of the guaranty period the several amounts necessary to make good the guaranty to each carrier to which said section is applicable.

It is ordered, That each carrier, or its successor, which on or before March 15, 1920, filed with the Commission a written statement that it accepted all the provisions of said section

209 be, and it is hereby, required on or before January 1, 1921, to file with this Commission true and correct returns to the questionnaire or form of statement which accompanies this order and is made a part hereof.

It is further ordered, That such returns shall be made with the approval and at the direction of the stockholders or board of directors, or duly authorized committee thereof, and shall bear the personal signature of the president, vice president, comptroller, or other officer of the respondent carrier who has knowledge of the statements made in such returns, and that such signature shall be attested under oath.

And it is further ordered, That each such return, when filed, shall be rendered in form substantially as indicated by the annexed sheets and shall be accompanied by six additional copies. Paper approximately 8½ x 11 inches in size should be used, but wherever necessary larger sheets folded to those dimensions may be inserted. The sheets of each copy should be securely fastened together. All returns should be transmitted to the secretary of the Commission.

By the Commission, Division 4:

[Seal] GEORGE B. McGINTY,
Secretary.

189 Outline of Form for Use by Carriers in Presenting Claim or Statement as a Basis for Settlement Under Section 209 of the Transportation Act, 1920.

To the Interstate Commerce Commission:

In accordance with the Commission's order dated October 18, 1920, relating to settlements with carriers under the guaranty provisions of section 209 of the transportation act, 1920, the ..... hereby answers the interrogatories contained in, and furnishes the other information required by the questionnaire or form which accompanied said order, as follows:

1. (a) State the full corporate name of respondent.

(b) Under the laws of what State or States incorporated?

2. Did respondent, on or before March 15, 1920, file with the Interstate Commerce Commission a written statement accepting all the provisions of section 209, transportation act, 1920?

3. Did respondent file with the Interstate Commerce Commission an annual report for each year for the years ended

June 30, 1915, June 30, 1916, December 31, 1916, June 30, 1917 (special report), December 31, 1917, December 31, 1918, and December 31, 1919? If reports were not filed for each of the periods indicated state which report or reports were not filed and give reason for not filing.

4. Did the respondent file with the Interstate Commerce Commission a monthly report of revenues and expenses for each month of the guaranty period, March to August, inclusive, 1920?

5. (a) Were the lines of road operated by the respondent during the guaranty period the same as those operated by it during the three-year test period ended June 30, 1917?

(b) If any lines which were, during any portion of the period of Federal control, a part of the railroad or system of transportation of the carrier, and whose railway operating income was included in such income of the carrier for the test period, did not continue to be a part of such railroad or system of transportation during the entire guaranty period or, in case any lines were acquired by, leased to, or consolidated with, the railroad or system of transportation of the carrier at any time since the end of the test period and prior to the expiration of the guaranty period for which separate operating returns to the Commission are not made in respect to the entire portion of the guaranty period, a full and complete statement with respect thereto should be made, which, among other things, should show dates of changes, names of carriers, and extent and location of mileage involved.

(c) If, during the period between June 30, 1914, and September 1, 1920, there were any receiverships or changes in the corporate name of the carrier operating the mileage covered by this report, due to reorganization or otherwise, a similar statement with respect thereto should be submitted.

6. (a) Was respondent under Federal control?

(b) If so, between what dates?

7. (a) If not under Federal control at the time Federal control terminated, was respondent a common carrier by railroad, or partly by railroad and partly by water, engaged in general transportation during the period of Federal control?

(b) If so, state the essential facts relied upon in support of such status.

8. Did the respondent enter into a contract or agreement with the Director General of Railroads covering all or a portion of the period of Federal control?

If so, state the nature of such contract, i. e., whether—

(a) Standard form, providing for compensation on an annual basis or a lump sum for the whole period of Federal operation;

(b) Cooperative (for roads having competitive traffic);

(c) Cooperative (for roads having no competitive traffic);

(d) Waiver of damages, etc.;

(e) Other form (describe fully).

190 9. If a contract involving the line or lines of road operated by the respondent during all or any portion of the guaranty period was entered into with the Director General of Railroads providing for just compensation under section 1 of the Federal control act, and if more than one operating carrier was involved, state the name of each operating carrier covered by such contract and the manner in which the total annual or lump-sum compensation was arrived at and the amount assigned to each operating carrier, if known to the respondent.

10. If respondent was not under Federal control at the time Federal control terminated, and during the period of Federal control claims to have been engaged in general transportation—

(a) Did it carry both passengers and freight during such period?

(b) Did it carry a variety of freight for the general public and not merely the special traffic of a particular industry during such period?

(c) If it served primarily a particular industry, approximately what percentage of its total freight revenue was derived from the traffic of such industry during such period?

11. (a) If not under Federal control at the time Federal control terminated, did respondent compete for traffic or connect with a railroad at any time under Federal control?

(b) If so, state the facts as to competition and connection relied upon.

12. If respondent a sleeping-car company whose system of transportation was under Federal control at the time Federal control terminated?

13. (a) Is respondent a carrier by street or interurban electric railway which was not under Federal control at the time Federal control terminated?

(b) If so, is its principal source of operating revenue

urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both?

(c) Is respondent's railroad at the present time operated by electricity?

14. Did respondent apply to the Commission for an advance under subdivision (h) of section 209 of the transportation act, 1920?

15. Amount claimed by respondent to be due from the United States or estimated to be due to the United States under the provisions of section 209 of the transportation act, 1920, after deducting (or adding) any advances under subdivision (h) of said section certified by the Commission to the Secretary of the Treasury of the United States:

Amount involved, not considering any advances that may have been certified by the Commission:

Claimed to be due respondent (see Schedule F) ..... $.....

Estimated to be due the United States (see Schedule F) ....

Amount received by respondent on certificates for advances issued by the Commission ..... $.....

Amount of advances certified by the Commission but not received by the respondent at the time of making this report ....

Total advances certified by the Commission .....

Amount due.....in final settlement.... .....

16. State the name, title, and address of the person with whom correspondence or conferences should be had with respect to this report.

17. Give the information called for in Schedule A to G, inclusive, following.

Note.—The schedules contained herein are designed primarily for use by steam railroads, and the names and numbers of the accounts are those provided in the accounting classifications and forms of reports for such carriers. Car-

riers other than steam railroads, such as sleeping car companies, electric railways, express companies, etc., should adapt the schedules to their particular systems of accounting and reporting and give the appropriate information corresponding to that required for steam railroads.

191 Schedule A.

(See instructions on sheet following).

Railway operating income (or deficit) of the.....

Note.—Show name of carrier which filed report with the Interstate Commerce Commission. If more than one, due to receivership, reorganization, etc., show in footnote name of each and period covered by the report of each.

Computed in the manner provided for in section 1 of the Federal control act, with adjustments therein required by the Interstate Commerce Commission, for the three years ended June 30, 1917.

Item. (a)	Year ended— June 30, 1915. (b)	June 30, 1916. (c)	June 30, 1917. (d)	Total. (e)	Average for 1 year, one-third of total. (f)	Average for 6 months, one-sixth of total. (g)
Credits.						
Railway operating revenues (state by primary accounts, showing total of operating revenues)	.....	.....	.....	.....	.....	.....
Equipment rents (state separately for accounts 503, 504, 505, 506, and 507)	.....	.....	.....	.....	.....	.....
Joint facility rent income (account 508)	.....	.....	.....	.....	.....	.....
Total credits	.....	.....	.....	.....	.....	.....
Debits.						
Railway operating expenses (state by primary accounts showing totals by general accounts and combined total)	.....	.....	.....	.....	.....	.....
Railway tax accruals (account 532)	.....	.....	.....	.....	.....	.....
Uncollectible railway revenue (account 533)	.....	.....	.....	.....	.....	.....
Equipment rents (state separately for accounts 536, 537, 538, 539, and 540)	.....	.....	.....	.....	.....	.....
Joint facility rents (account 541)	.....	.....	.....	.....	.....	.....
Total debits	.....	.....	.....	.....	.....	.....
Railway operating income (or deficit)	.....	.....	.....	.....	.....	.....
Adjustments (see instructions following):						
1. "War taxes"	.....	.....	.....	.....	.....	.....
2. Wages paid or payable under Adamson law	.....	.....	.....	.....	.....	.....
3. Correction of accounting errors	.....	.....	.....	.....	.....	.....
Railway operating income (or deficit) as adjusted	.....	.....	.....	.....	.....	.....
Average number of miles of road operated	.....	.....	.....	.....	.....	.....
Average number of miles of track operated the maintenance expenses of which were charged to primary maintenance accounts other than joint facility accounts:						
First main track	.....	.....	.....	.....	.....	.....
Other main track	.....	.....	.....	.....	.....	.....
Yard tracks and sidings	.....	.....	.....	.....	.....	.....
Total	.....	.....	.....	.....	.....	.....

192 Instructions Relating to Schedule A.

The amounts reported in the foregoing Schedule A as "credits" and "debits," respectively, should agree with the returns made by the reporting carrier or carriers to the Interstate Commerce Commission in the annual reports for the years ended June 30, 1915 and 1916, and the special report for the year ended June 30, 1917. If during the test period there was a receivership, reorganization, or change in the corporate name, that fact should be stated in a footnote to Schedule A, the name of each separate corporation operating the property should be given, and the period during which the property was operated by each corporation or a receiver should be shown.

The adjustments required with respect to railway operating income credits and debits are—

1. "War taxes."—There should be included in the final result one-half the amount of war taxes, if any, assessed against the respondent under the act of Congress approved October 3, 1917, upon the income for the calendar year 1917, chargeable under the Commission's accounting regulations to income account 532, "Railway tax accruals." The respondent should determine the amount, if any, of such taxes included in the debit item "Railway tax accruals" for the year ended June 30, 1917, and compare such amount with one-half the war taxes assessed for the calendar year 1917 and add to or deduct from the "Railway operating income (or deficit)" as may be appropriate.

2. Wages paid or payable under Adamson law.—There should be deducted from "Railway operating income (or deficit)" the total amount, if any, of wages paid or payable under the act of Congress approved September 3 and 5, 1916, commonly known as the Adamson law, for services rendered during the six months ended June 30, 1917, which was not included in the debit items used in computing such "Railway operating income (or deficit)."

3. Corrections of accounting errors.—There should be added to or deducted from the "Railway operating income (or deficit)" such amount, if any, as has been determined by the Commission, after an examination of the respondent's accounts, as being requisite to adjust the accounts kept by the respondent during the three years ended June 30, 1917, in accordance with the established accounting regulations.

(Only carriers whose accounts have been examined by representatives of the Commission's Bureau of Accounts and whose average annual railway operating income, or deficit, has been finally determined by the Commission should report under this item.)

4. Changes in lines of road operated.—Paragraph (2) of subdivision (f) of section 209 of the transportation act, 1920, provides for adjustments in railway operating income because of changes in line of road operated during the test or guaranty periods. In making such adjustments, if any are required, the lines of road operated during the guaranty period, as reflected in the statement under Schedule C following, will be controlling. If, therefore, the lines of railroad operated were not the same during the three-year test period and the six-months guaranty period the statement submitted under Schedule A should be so adjusted as to correspond with Schedule C in the matter of lines of road represented. For example: If, during the test period roads X and Y were separately operated and made separate reports, but since the end of the test period their operations have been consolidated and for the guaranty period a combined report of operations is made under Schedule C, separate statements under Schedule A should be submitted for road X and road Y, respectively, and the two statements should then be combined for comparison with Schedule C.

If the reverse situation should obtain—i. e., if a combined statement of the operations of roads X and Y was made for the test period, but they were separately operated during the guaranty period, there should be shown in Schedule A the results of operations during the test period of the road the operations of which for the guaranty period are shown in Schedule C.

193 If the information is not readily available for making the separations as outlined, the respondent should present to the Commission a complete statement of the facts and request instructions as to the procedure to be followed.

The foregoing instructions do not relate to changes in operated mileage growing out of new construction or abandonment.

Schedule B.

Railway operating income (or deficit) of the ..... for the six months, March to August, inclusive, 1918 and 1919, computed in the manner provided in section 1 of the Federal control act.

Item.	Six Months, March to August, inclusive.	
(a)	1918 (b)	1919 (c)
Credits.		
Railway operating revenues (state by primary accounts, showing total of railway operating revenue)	....	....
Equipment rents (state separately for accounts 503, 504, 505, 506, 507)	....	....
Joint facility rent income (account 508)	....	....
Total credits	....	....
Debits.		
Railway operating expenses (state by primary accounts, showing totals of general accounts and combined total)	....	....
Railway tax accruals (account 532) (Carriers not under Federal control and operation should exclude "war taxes.")	....	....
Uncollectible railway revenues (account 533)	....	....
Equipment rents (state separately for accounts 536, 537, 538, 539, 540)	....	....
Joint facility rents (account 541)	....	....
Total debits	....	....
Railway operating income (or deficit)	....	....
Average number of miles of road operated	....	....
Average number of miles of track operated the maintenance expenses of which were charged to primary maintenance accounts other than joint facility accounts:		
First main track	....	....
Other main track	....	....
Yard track and sidings	....	....
Total miles of track operated and maintained	....	....

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Schedule C.

Adjusted Railway Operating Income (or Deficit) for the Guaranty Period of the

.....

(Name of respondent carrier.)

Computed in the manner provided for in section 1 of the Federal control act, with adjustments as required by section 209 of the transportation act, 1920.

Note.—The adjustments herein required have reference solely to the method of compiling this return and require no change in the respondent's books of account if kept in conformity with the commission's accounting regulations.

Instructions.

Column (a).—There should be shown in this column the items provided for in Schedule A, omitting "adjustments."

Columns (b) to (h), inclusive.—The figures reported in these columns should be those shown by the corporate income accounts of the respondent for the months indicated. If the respondent was under Federal control on February 29, 1920, audited Federal control period lap overs which were charged or credited during the guaranty period to the United States Railroad Administration should be excluded.

Columns (i) and (j).—In column (i) should be shown the adjustments in railway operating income required by section 209 of the transportation act, 1920, more fully explained on the sheet following. In column (j) should be shown the adjusted items after applying to the amounts reported in column (h) the adjustments shown in column (i). As far as practicable the adjustments in column (i) should be shown by primary accounts, but where necessary they may be shown by general accounts.

Item.	Months of 1920								
	March.	April.	May.	June.	July.	August.	Totals.	Adjustments	Totals as adjusted.
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)
(The items in this column should be stated by primary accounts the same as indicated for the similar column in Schedule A, including the miles of road operated and maintained.)									

Supplement to Schedule C.

There should be appended to Schedule C a supplementary statement showing in detail all of the adjustment items reported in column (i) and the method or formula employed in arriving at the amount of each.

The adjustments provided for in column (i) of Schedule C are those required by paragraphs (1) to (5), inclusive, of subdivision (f) of section 209 of the transportation act, 1920.

195 (Include in returns as Schedule [C-1.)]

Paragraph (1) relates to equipment and joint facility rents and to electric-railway operations. Debits and credits in connection with equipment rents and joint facility rents have been provided for among the "items" in Schedule C, and no further adjustments of these items under paragraph (1) will be necessary. Debits and credits, if any, arising from the operation of electric railways should be excluded.

(Include in returns as Schedule C-2.)

Paragraph (2) relates to changes in lines of road during test or guaranty periods. The changes to be considered are those growing out of sale, purchase, lease, consolidation, or merger. Where these changes involve a combination or segregation of lines in existence during the test period, necessary adjustment will be made under Schedule A. Adjustments under Schedule C should be confined to those which the carrier considers appropriate in connection with other changes in line operated.

(Include in returns as Schedule C-3.)

Paragraph (3) relates to maintenance expenses, and reference is made therein to certain provisions of the "standard contract" between the United States and carriers that were under Federal control. For convenient reference pertinent paragraphs of section 5 of the standard contract are quoted, as follows:

Section 5.—Upkeep.

Sec. 5. (a) During the period of Federal control the Director General shall, annually, as nearly as practicable, expend and charge to railway operating expenses, either in payments for labor and material or by payments into funds, such

sums for the maintenance, repair, renewal, retirement, and depreciation of the property described in paragraph (a) of section 2 hereof as may be requisite in order that such property may be returned to the Companies at the end of Federal control in substantially as good repair and in substantially as complete equipment as it was on January 1, 1918: Provided, however, That the annual expenditure and charges for such purposes during the period of Federal control on such property and the fair distribution thereof over the same, or the payment into funds of an amount equal in the aggregate (subject to the adjustment provided in paragraph (c) and to the provisions of paragraph (e) of this section) to the average annual expenditure and charges for such purposes included under the accounting rules of the Commission in railway operating expenses during the test period, less the cost of fire insurance included therein, shall be taken as a full compliance with the foregoing covenant.

* * * * * * *

(c) In comparing the amounts expended and charged under the provisions of paragraphs (a) and (b) of this section with the amounts expended and charged during the test period, due allowance shall be made for any difference that may exist between the cost of labor and materials and between the amount of property taken over and the average for the test period, and, as to paragraph (a), for any difference in use between that of the test period and during Federal control which in the opinion of the Commission is substantial enough to be considered, so that the result shall be, as nearly as practicable, the same relative amount, character, and durability of physical reparation.

Consideration has been given to the matter of formulas to be applied in making adjustment of maintenance expenses, but no such formulas have as yet been adopted by the Commission. Each respondent carrier may, therefore, prepare and submit for the consideration of the Commission such data with respect to the adjustments which it may propose in connection with maintenance expenses as it deems proper under the provisions of the law applicable thereto. The principal factors which the Commission will consider in fixing the amounts to be included in operating expenses for the guaranty period for maintenance of way and structures and for maintenance of equipment are—

(a) The differences in the cost of labor and material;

(b) The difference in the amount of property used; and

196 (c) The difference in the use of the property, during the guaranty period as compared with the test period.

The respondent carrier should be governed accordingly in preparing data in support of any adjustments proposed.

(Include in returns as Schedule C-4.)

Paragraph (4) relates to taxes. Taxes generally known as "war taxes" should be excluded. The taxes referred to are the 8 per cent income tax and the excess-profits tax. The 2 per cent normal income tax should be included.

(Include in returns as Schedule C-5.)

Paragraph (5) relates to the exclusion of disproportionate or unreasonable charges, etc. The respondent should make such adjustments as in its opinion are required by the provisions of the paragraph and in the light of the Commission's order of June 10, 1920, relating to the manner in which the railway operating income applicable to the guaranty period is to be determined for the purpose of arriving at the amount payable under the guaranty provisions of section 209 of the transportation act, 1920. Such adjustments as may be included in Schedule C-6 following, should be omitted from Schedule C-5.

The order of June 10, 1920, just referred to, provides, among other things, that in computing railway operating income, or any deficit therein, for the guaranty period for the purpose of section 209, no charges to income for the guaranty period will be permitted which relate to transactions originating prior to March 1, 1920, or subsequent to August 31, 1920, whether such charges represent actual expenditures or credits to reserve accounts created to reflect accruals. All such charges, if any, which have been included in the accounts for the guaranty period, should be eliminated. On the other hand, debits or credits to railway operating income which relate to transactions during the guaranty period but which were not audited or provided for through suspense or reserve accounts during such period should be included in the adjustment. Schedules supplemental to Schedule C and covering such lap-over items, should be submitted in forms substantially as follows:

(Include in returns as Schedule C-6.)

Charges to Income During the Guaranty Period Relating to Transactions of Other Periods, Eliminated as Per Column (I), Schedule C.

Month, year, or period of transaction.	Account or accounts affected.	Amount included in column (i), Schedule C.

Carriers which were under Federal control on February 29, 1920, should include in the foregoing schedule the Federal control period lap overs, if any, the exclusion of which from the corporate accounts of the guaranty period was not accomplished during that period.

(Include in returns as Schedule C-7.)

Debits and Credits to Income Relating to Guaranty Period Transactions, Included in Adjustments as Per Column (i), Schedule C.

Account or accounts affected.	Debit items.	Credit items.

There should be included in the foregoing schedule the guaranty period lap overs unaudited or unaccounted for during that period, estimated to apply to that period but not covered by suspense or reserve accounts. There should not
197 be included credit or debit balances in suspense or reserve accounts at August 31, 1920, reflected in the figures reported in column (h) of Schedule C. Considering such balances, if any, such adjustments should be made as in the opinion of the respondent are appropriate to properly state the railway operating income for the guaranty period resulting from the transactions of such period. Inventory adjustments referred to in the Commission's notice dated August 23, 1920, should be included in Schedule C-7.

For the information of the Commission there should be submitted by each respondent carrier schedules as follows:

(Include in returns as Schedule C-8.)

Lap Overs From the Federal Control Period.

(Applies only to carriers under Federal control on February 29, 1920.)

Accounts.	Federal lap overs accounted for during the guaranty period which were charged or credited to the United States Railroad Administration during that period, and not included in column (h), Schedule C.	Federal lap overs not excluded from the corporate accounts of the guaranty period and reflected in column (h), Schedule C, adjusted by Schedule C-6.	Total.

(Include in returns as Schedule C-9.)

Guaranty Period Lap Overs.

Income account or accounts affected.	Income debits and credits relating to guaranty period transactions, represented by balances in reserve accounts or covered by adjustments under Schedule C-7, reflected in column (j) of Schedule C, but not audited during the guaranty period.			
	[alance] in operating reserve account as of Aug. 31, 1920.	Adjustments under Schedule C-7.	Total.	Audited since Aug. 31, 1920.	Balance unaudited at date of filing returns

(Include in returns as Schedule C-10.)

Balance in Operating Reserve Accounts at Beginning and Close of Guaranty Period.

Note.—Carriers which carried forward no operating reserves from the period prior to March 1, 1920, may omit this schedule as balances at the close of the guaranty period will have been reported in Schedule C-9.

Name of suspense or reserve account as per ledger.	Name of income account involved.	Debit balances.		Credit balances.	
		Mar. 1, 1920.	Aug. 31, 1920.	Mar. 1, 1920.	Aug. 31, 1920.

198 (Include in returns as Schedule C-11.)

Increase in Operating Expenses of Guaranty Period Due to Wage Award of July 20, 1920.

Item.	Total increase chargeable to operating expenses of guaranty period.	Amount audited or accrued in accounts of guaranty period and included in column (h), Schedule C,	Adjustment, if any, included in column (i), Schedule C.
Maintenance of way and structures	.....	.....	.....
Maintenance of equipment	.....	.....	.....
Transportation expenses	.....	.....	.....
All other operating expenses	.....	.....	.....
Total	.....	.....	.....

There should be included in the foregoing Schedule C-11 the increase in operating expenses of the guaranty period due directly or indirectly to the award of the United States Railroad Labor Board, Decision No. 2, dated July 20, 1920.

Schedule D.

Comparative results for the several periods.

Item.	Six months of test period, per Schedule A, column (g)	March to August, per Schedule B.		Guaranty period as adjusted per Schedule C, column (j)	Averages per mile of road operated.		
		1918	1919		For test period.	For guaranty period.	Ratio, guaranty period to test period.
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)
(There should be shown in this column the same items as those provided for in column (a) of Schedule A).	.....	.....	.....	.....	.....	.....	.....
	.....	.....	.....	.....	.....	.....	.....
	.....	.....	.....	.....	.....	.....	.....

Schedule E.

Basis for Computing the Guaranty.

Instructions.—The basis for computing the amount of the guaranty, or of the excess of railway operating income over

the guaranty, is not the same for all carriers accepting the provisions of section 209 of the transportation act, 1920. The different bases are fully set forth in the act, and are briefly outlined below. Each reporting carrier should determine which of the several bases is applicable to it and report accordingly.

199 1. Carriers with which a contract has been made fixing the amount of just compensation under the Federal-control act (see paragraph (1) of subdivision (c) of section 209):

(a) If the amount of just compensation payable under section 1 of the Federal-control act was fixed on an annual basis—

One-half of the amount named in such contract as annual compensation ..... $

Plus one-half the annual amount of increase, if any, in such just compensation as provided for in section 4 of the Federal-control act (Sec. 4. That the just compensation that may be determined as hereinbefore provided by agreement or that may be adjudicated by the Court of Claims shall be increased by an amount reckoned at a reasonable rate per centum to be fixed by the President upon the cost of any additions and betterments, less retirements, and upon the cost of road extensions to the property of such carrier made by such carrier with the approval of or by order of the President while such property is under Federal control.) .....

Total .....

(b) If the contract fixed a lump sum as compensation for the whole period of Federal operation—

Such proportion of the lump sum so fixed as 6 months (the guaranty period) bears to the number of months during which the applicant's road was under Federal operation .....

Plus such proportion of the amount of increase in such compensation, if any, provided for in section 4 of the Federal-control act (Sec. 4. That the just compensation that may be determined as hereinbefore provided by agreement or that may be adjudicated by the Court of Claims shall be increased by an amount reckoned at a reasonable rate per centum to be fixed by the President upon the cost of any additions and betterments, less retirements, and upon the cost of road extensions to the property of such carrier made by such carrier with the approval of or by order of the President while such property is under Federal control.) as six months (the guaranty period) bears to the number of months during which such increase in compensation was allowed .....

Total .....

2. Carriers entitled to just compensation under the Federal control act with which contracts have not been made (see paragraph (2) of subdivision (c) of section 209):

One-half of the annual amount estimated by the President as just compensation under the Federal control act .....

Plus one-half the annual increase in such estimated just compensation, if any, provided for in section 4 of the Federal control act .....

Total .....

3. Carriers whether or not entitled to just compensation under the Federal control act with which contracts have not been made, and for which no estimate of just compensation is made by the President, and which for the test period as a whole sustained a deficit in railway operating income (see paragraph (3) of subdivision (c) of section 209):

The amount by which any deficit in the railway operating income of the respondent for the guaranty period as a whole exceeds one-half of its average annual deficit in railway operating income for the test period .....

Plus an amount equal to one-half the annual sum fixed by the President under section 4 of the Federal control act.....

Total .....

4. Carriers not entitled to just compensation under the Federal control act, which for the test period as a whole had an average annual railway operating income (see paragraph (4) of subdivision (c) of section 209):

One-half the average annual railway operating income of the respondent during the test period .....

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Schedule F.

Estimated amount of guaranty payable by the United States to reporting carrier or amount of excess income payable by reporting carrier to the United States.

Items.	Debits to carrier.	Credits to carrier.
All carriers reporting under sections 1, 2, or 4 of Schedule E:		
Total amount reported under Schedule E, section 1, item (a)	$(*)	$
Total amount reported under Schedule E, section 1, item (b)	(*)	
Total amount reported under Schedule E, section 2	(*)	
Total amount reported under Schedule E, section 4	(*)	
Railway operating income during the guaranty period, as per Schedule C, column (j)		(*)
Railway operating deficit during the guaranty period, as per Schedule C, column (j)	(*)	
Total	....	....
Excess of credits over debits, payable by the United States to respondent carrier	....	....
Excess of debits over credits, payable by the respondent carrier to the United States	....	....
All carriers reporting under section 3 of Schedule E:		
If the respondent carrier sustained a railway operating deficit for the guaranty period, and if this deficit exceeded one-half its average annual deficit in railway operating income for the test period as reported in Schedule A—		
Railway operating deficit for the guaranty period, as per Schedule C, column (j)	(*)	
One-half annual railway operating deficit for the test period, as per Schedule A		(*)
One-half of the annual sum fixed by the President with respect to the respondent carrier under section 4 of the Federal control act	(*)	
Total	....	....
Excess of credits over debits, payable by the United States to respondent carrier	....	....
If the respondent carrier had a railway operating income for the guaranty period as a whole in excess of one-half the annual sum fixed by the President with respect to such carrier under section 4 of the Federal control act—		
Railway operating income for the guaranty period, as per schedule C, column (j)		(*)
One-half of the annual sum fixed by the President with respect to the respondent carrier under section 4 of the Federal control act	(*)	
Excess of debits over credits, payable by respondent carrier to the United States	....	....

201 Schedule G.

Statistics.

Item. (a)	Average for one-sixth of test period (b)	March to August, inclusive, 1920. (c)	Ratio, guaranty period to test period. (d)
1. Average miles of road operated	.....	.....	.....
2. Ton-miles, revenue freight	.....	.....	.....
3. Passenger-miles, revenue	.....	.....	.....
Train-Miles.			
4. Freight	.....	.....	.....
5. Passenger	.....	.....	.....
6. Mixed	.....	.....	.....
7. Special	.....	.....	.....
8. Total transportation service	.....	.....	.....
9. Work service	.....	.....	.....
10. Total train-miles	.....	.....	.....
Locomotive-Miles.			
11. Freight	.....	.....	.....
12. Passenger	.....	.....	.....
13. Mixed	.....	.....	.....
14. Special	.....	.....	.....
15. Train switching	.....	.....	.....
16. Total of items 11, 12, 13, 14, and 15	.....	.....	.....
17. Yard switching	.....	.....	.....
18. Total transportation service locomotive-miles	.....	.....	.....
19. Work service	.....	.....	.....
20. Total locomotive-miles	.....	.....	.....
Car-Miles.			
21. Total miles, freight-train cars	.....	.....	.....
22. Total miles, passenger-train cars	.....	.....	.....
23. Total transportation service car-miles	.....	.....	.....
24. Work service	.....	.....	.....
25. Total car-miles	.....	.....	.....
Averages Per Mile of Road.			
26. Train-miles (item 10 divided by item 1)	.....	.....	.....
27. Locomotive-miles (item 20 divided by item 1)	.....	.....	.....
28. Car-miles (item 25 divided by item 1)	.....	.....	.....
29. Ton-miles, revenue freight (item 2 divided by item 1)	.....	.....	.....
30. Passenger-miles, revenue (item 3 divided by item 1)	.....	.....	.....

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Item. (a)	Average for one-sixth of test period (b)	March to August, inclusive, 1920. (c)	Ratio, guaranty period to test period. (d)
Averages per Locomotive-Mile.			
(Use item 20 as a divisor in computing).			
31. Steam locomotives, repairs (account 308)	.....	.....	.....
32. Steam locomotives, depreciation (account 309)	.....	.....	.....
33. Steam locomotives, retirements (account 310)	.....	.....	.....
34. Other locomotives, repairs (account 311)	.....	.....	.....
35. Other locomotives, depreciation (account 312)	.....	.....	.....
36. Other locomotives, retirements (account 313)	.....	.....	.....
37. Total items 31 to 36, inclusive	.....	.....	.....
Averages Per Freight-Train Car-Mile.			
(Use item 21 as a divisor in computing.)			
38. Freight-train cars, repairs (account 314)	.....	.....	.....
39. Freight-train cars, depreciation (account 315)	.....	.....	.....
40. Freight-train cars, retirements (account 316)	.....	.....	.....
41. Total items 38 to 40, inclusive	.....	.....	.....
Averages Per Passenger-Train Car-Mile.			
(Use item 22 as a divisor in computing.)			
42. Passenger-train cars, repairs (account 317)	.....	.....	.....
43. Passenger-train cars, depreciation (account 318)	.....	.....	.....
44. Passenger-train cars, retirements (account 319)	.....	.....	.....
45. Motor equipment of cars, repairs (account 320)	.....	.....	.....
46. Motor equipment of cars, depreciation (account 321)	.....	.....	.....
47. Motor equipment of cars, retirements (account 322)	.....	.....	.....
48. Total items 42 to 47, inclusive	.....	.....	.....
Averages Per Yard Switching Locomotive-Mile. (Use item 17 as a divisor in computing.)			
49. Yardmasters and yard clerks (account 377)	.....	.....	.....
50. Yard conductors and brakemen (account 378)	.....	.....	.....
51. Yard switch and signal tenders (account 379)	.....	.....	.....
52. Yard enginemen (account 380)	.....	.....	.....
53. Yard motormen (account 381)	.....	.....	.....
54. Fuel for yard locomotives (account 382)	.....	.....	.....
55. Yard switching power produced (account 383)	.....	.....	.....
56. Yard switching power purchased (account 384)	.....	.....	.....
57. Water for yard locomotives (account 385)	.....	.....	.....
58. Lubricants for yard locomotives (account 386)	.....	.....	.....
59. Other supplies for yard locomotives (account 387)	.....	.....	.....
60. Engine-house expenses, yard (account 388)	.....	.....	.....
61. Yard supplies and expenses (account 389)	.....	.....	.....
62. Operating joint yards and terminals, Dr. (account 390)	.....	.....	.....
63. Operating joint yards and terminals, Cr. (account 391)	.....	.....	.....
64. Total items 49 to 63, inclusive	.....	.....	.....

Item. (a)	Average for one-sixth of test period (b)	March to August, inclusive, 1920. (c)	Ratio, guaranty period to test period. (d)
Averages Per Train Locomotive-Mile.			
(Use item 16 as a divisor in computing.)			
65. Train enginemen (account 392)	.....	.....	.....
66. Train motormen (account 393)	.....	.....	.....
67. Fuel for train locomotives (account 394)	.....	.....	.....
68. Train power produced (account 395)	.....	.....	.....
69. Train power purchased (account 396)	.....	.....	.....
70. Water for train locomotives (account 397)	.....	.....	.....
71. Lubricants for train locomotives (account 398)	.....	.....	.....
72. Other supplies for train locomotives (account 399)	.....	.....	.....
73. Engine-house expenses, train (account 400)	.....	.....	.....
Total items 65 to 73, inclusive	.....	.....	.....
73½.			
Averages Per Transportation Service Train-Mile.			
(Use item 8 as a divisor in computing.)			
74. Superintendence (account 371)	.....	.....	.....
75. Dispatching trains (account 372)	.....	.....	.....
76. Trainmen (account 401)	.....	.....	.....
77. Train supplies and expenses (account 402)	.....	.....	.....
78. Signal and interlocker operation (account 404)	.....	.....	.....
79. Crossing protection (account 405)	.....	.....	.....
80. Drawbridge operation (account 406)	.....	.....	.....
81. Telegraph and telephone operation (account 407)	.....	.....	.....
82. Total items 74 to 81, inclusive	.....	.....	.....
Equipment Owned or Leased in the Service of and Maintained by the Respondent.			
83. Total number of locomotives	.....	.....	.....
84. Total tractive capacity of locomotives, in 1,000 pounds	.....	.....	.....
85. Total dead-weight of locomotives, including tender, in tons of 2,000 pounds	.....	.....	.....
86. Total number of freight-train cars	.....	.....	.....
87. Total carrying capacity of freight-train cars, in tons of 2,000 pounds	.....	.....	.....
88. Total dead-weight of freight-train cars, in tons of 2,000 pounds	.....	.....	.....
89. Total number of passenger-train cars	.....	.....	.....
90. Total dead-weight of passenger-train cars	.....	.....	.....
91. Total number units company service equipment (The units of company service equipment and floating equipment should be shown by classes so far as practicable)	.....	.....	.....
92. Total number units floating equipment (The units of company service equipment and floating equipment should be shown by classes so far as practicable)	.....	.....	.....

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Item (a)	Average for one-sixth of test period. (b)	March to August, inclusive, 1920. (c)	Ratio, guaranty period to test period. (d)
Average Investment in Road and Equipment.			
93. Road			
94. Equipment			
95. Total road and equipment			
Miles of Track Owned			
96. First main track			
97. Other main track			
98. Yard tracks and sidings			
99. Total miles of track owned			

Note.—The respondent is invited to present such other and further statistical data as to it may seem pertinent.

Verification.

State of .....,

County of ....., ss:

.....makes oath and says that he is the .....
(Title)
of the .....; that he has carefully examined each
(Full name of respondent)
and all of the statements contained in the foregoing return; that they are true and correct to the best of his knowledge and belief; that the foregoing return is made with the approval and at the direction of the ....,
(Stockholders, board of directors, or duly authorized committee.)
as appears by the minutes of a meeting (the returns should be accompanied by a certified copy of minutes) of said .....held at ...., on the .... day of ....., 192..., and that he has been authorized by said ....., as appears by the minutes of said meeting, to execute such papers as may be required in connection with any settlement that may be made between the respondent and the United States under section 209 of the transportation act, 1920.

.....
Signature of affiant.

Subscribed and sworn to before me, a ..... in and for the State and county above named, this .. day of ....., 192....

(Seal.) ....

My commission expires ...., ...

205 Appendix A.

Section 209, Transportation Act, 1920.

Guaranty to Carriers After Termination of Federal Control.

Sec. 209. (a) When used in this section—

The term "carrier" means (1) a carrier by railroad or partly by railroad and partly by water, whose railroad or system of transportation is under Federal control at the time Federal control terminates, or which has heretofore engaged as a common carrier in general transportation and competed for traffic, or connected, with a railroad at any time under Federal control; and (2) a sleeping car company whose system of transportation is under Federal control at the time Federal control terminates; but does not include a street or interurban electric railway not under Federal control at the time Federal control terminates, which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both;

The term "guaranty period" means the six months beginning March 1, 1920.

The term "test period" means the three years ending June 30, 1917; and

The term "railway operating income" and other references to accounts of carriers by railroad shall, in the case of a sleeping car company, be construed as indicating the appropriate corresponding accounts in the accounting system prescribed by the Commission.

(b) This section shall not be applicable to any carrier which does not on or before March 15, 1920, file with the Commission a written statement that it accepts all the provisions of this section.

(c) The United States hereby guarantees—

(1) With respect to any carrier with which a contract (exclusive of so-called cooperative contracts or waivers)

has been made fixing the amount of just compensation under the Federal Control Act, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one-half the amount named in such contract as annual compensation, or, where the contract fixed a lump sum as compensation for the whole period of Federal operation, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than an amount which shall bear the same proportion to the lump sum so fixed as six months bears to the number of months during which such carrier was under Federal operation, including in both cases the increases in such compensation provided for in section 4 of the Federal Control Act;

(2) With respect to any carrier entitled to just compensation under the Federal Control Act, with which such a contract has not been made, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one-half of the annual amount estimated by the President as just compensation for such carrier under the Federal Control Act, including the increases in such compensation provided for in section 4 of the Federal Control Act. If any such carrier does not accept the President's estimate respecting its just compensation, and if in proceedings under section 3 of the Federal Control Act it is determined that a larger or smaller annual amount is due as just compensation, the guaranty under this paragraph shall be increased or decreased accordingly;

(3) With respect to any carrier, whether or not entitled to just compensation under the Federal Control Act, with which such a contract has not been made, and for which no estimate of just compensation is made by the President, and
206 which for the test period as a whole sustained a deficit in railway operating income, the guaranty shall be a sum equal to (a) the amount by which any deficit in its railway operating income for the guaranty period as a whole exceeds one-half of its average annual deficit in railway operating income for the test period, plus (b) an amount equal to one-half the annual sum fixed by the President under section 4 of the Federal Control Act;

(4) With respect to any carrier not entitled to just compensation under the Federal Control Act, which for the test period as a whole had an average annual railway operating income, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one-half the average annual railway operating income of such carrier during the test period.

(d) If for the guaranty period as a whole the railway operating income of any carrier entitled to a guaranty under paragraph (1), (2), or (4) of subdivision (c) is in excess of the minimum railway operating income guaranteed in such paragraph, such carrier shall forthwith pay the amount of such excess into the Treasury of the United States. If for the guaranty period as a whole the railway operating income of any carrier entitled to a guaranty under paragraph (3) of subdivision (c) is in excess of one-half of the annual sum fixed by the President with respect to such carrier under section 4 of the Federal Control Act, such carrier shall forthwith pay the amount of such excess into the Treasury of the United States. The amounts so paid into the Treasury of the United States shall be added to the funds made available under section 202 for the purposes indicated in such section. Notwithstanding the provisions of this subdivision, any carrier may retain out of any such excess any amount necessary to enable it to pay its fixed charges accruing during the guaranty period.

(e) For the purposes of this section railway operating income, or any deficit therein, for the test period shall be computed in the manner provided for in section 1 of the Federal Control Act.

(f) In computing railway operating income, or any deficit therein, for the guaranty period for the purposes of this section—

(1) Debits and credits arising from the accounts, called in the monthly reports to the Commission equipment rents and joint facility rents, shall be included, but debits and credits arising from the operation of such street electric passenger railways, including railways commonly called interurbans, as are not under Federal control at the time of termination thereof, shall be excluded;

(2) Proper adjustments shall be made (a) in case any lines which were, during any portion of the period of Federal control, a part of the railroad or system of transportation of the carrier, and whose railway operating income was included in such income of the carrier for the test period, do not continue to be a part of such railroad or system of transportation during the entire guaranty period, and (b) in case of any lines acquired by, leased to, or consolidated with, the railroad or system of transportation of the carrier at any time since the end of the test period and prior to the expiration of the guaranty period, for which separate operating returns to the Commission are not made in respect to the entire portion of the guaranty period;

(3) There shall not be included in operating expenses, for maintenance of way and structures, or for maintenance of equipment, more than an amount fixed by the Commission. In fixing such amount the Commission shall so far as practicable apply the rule set forth in the proviso in paragraph (a) of section 5 of the "standard contract" between the United States and the carriers (whether or not such contract has been entered into with the carrier whose railway operating income is being computed);

(4) There shall not be included any taxes paid under Title I or II of the Revenue Act of 1917, or such portion of the taxes paid under Title II or III of the Revenue Act of 1918 as by the terms of such Act are to be treated as levied by an Act in amendment of Title I or II of the Revenue Act of 1917; and

(5) The Commission shall require the elimination and restatement of the operating expenses and revenues (other than for maintenance of way and structures, or main-
207 tenance of equipment) for the guaranty period, to the extent necessary to correct and exclude any disproportionate or unreasonable charge to such expenses or revenues for such period, or any charge to such expenses or revenues for such period which under a proper system of accounting is attributable to another period.

(g) The Commission shall, as soon as practicable after the expiration of the guaranty period, ascertain and certify to the Secretary of the Treasury the several amounts necessary to make good the foregoing guaranty to each carrier. The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States, for the amount shown in such certificate as necessary to make good such guaranty. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated.

(h) Upon application of any carrier to the Commission, asking that during the guaranty period there may be advanced to it from time to time such sums, not in excess of the estimated amount necessary to make good the guaranty, as are necessary to enable it to meet its fixed charges and operating expenses, the Commission may certify to the Secretary of the Treasury the amount of, and times at which, such advances, if any, shall be made. The Secretary of the Treasury, on receipt of such certificate, is authorized and directed to make the advances in the amounts and at the times specified in the certificate, upon the execution by the carrier of a

contract, secured in such manner as the Secretary may determine, that upon final determination of the amount of the guaranty provided for by this section such carrier will repay to the United States any amounts which it has received from such advances in excess of the guaranty, with interest at the rate of 6 per centum per annum from the time such excess was paid. There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, a sum sufficient to enable the Secretary of the Treasury to make the advances referred to in this subdivision.

(i) If the American Railway Express Company shall, on or before March 15, 1920, file with the Commission a written statement that it accepts all the provisions of this subdivision, the contract of June 26, 1918, between such company and the Director General of Railroads, as amended and continued by agreement dated November 21, 1918, shall remain in full force and effect during the guaranty period in so far as the same constitutes a guaranty on the part of the United States to such company against a deficit in operating income.

In computing operating income, and any deficit therein, for the guaranty period for the purposes of this subdivision, the Commission shall require the elimination and restatement of the operating expenses and revenues for the guaranty period, to the extent necessary to correct and exclude any disproportionate or unreasonable charge to such expenses or revenues for such period, or any charge to such expenses or revenues for such period which under a proper system of accounting is attributable to another period, and to exclude from operating expenses so much of the charge for payment for express privileges to carriers on whose lines the express traffic is carried as is in excess of 50.25 per centum of gross express revenue.

For the guaranty period the American Railway Express Company shall pay to every carrier which accepts the provisions of this section, as provided in subdivision (b) hereof, 50.25 per centum of the gross revenue earned on the transportation of all its express traffic on the carrier's lines, and every such carrier shall accept from the American Railway Express Company such percentage of the gross revenue as its compensation. In arriving at the gross revenue on through or joint express traffic, the method of dividing the revenue between the carriers shall be that agreed upon between the carriers and such express company and approved by the Commission.

If for the guaranty period as a whole the American Railway Express Company does not have a deficit in operating

income, it shall forthwith pay the amount of its operating income for such period into the Treasury of the
208 United States. The amount so paid shall be added to the funds made available under section 202 for the purposes indicated in such section.

The Commission shall, as soon as practicable after the expiration of the guaranty period, certify to the Secretary of the Treasury the amount necessary to make good the foregoing guaranty to the American Railway Express Company. The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of such company upon the Treasury of the United States for the amount shown in such certificate as necessary to make good such guaranty. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated.

Upon application of the American Railway Express Company to the Commission, asking that during the guaranty period there may be advanced to it from time to time such sums, not in excess of the estimated amount necessary to make good the guaranty, as are necessary to enable it to meet its operating expenses, the Commission may certify to the Secretary of the Treasury the amount of, and times at which, such advances, if any, shall be made. The Secretary of the Treasury, on receipt of such certificate, is authorized and directed to make the advances in the amounts and at the times specified in the certificate, upon the execution by such company of a contract, secured in such manner as the Secretary may determine, that upon final determination of the amount of the guaranty provided for by this subdivision such company will repay to the United States any amounts which it has received from such advances in excess of the guaranty, with interest at the rate of 6 per centum per annum from the time such excess was paid. There is hereby appropriated out of any money in the Treasury not otherwise appropriated a sum sufficient to enable the Secretary of the Treasury to make the advances referred to in this subdivision.

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Appendix B.

Interstate Commerce Commission.
Washington.

Order.

At a session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 10th day of June, A. D. 1920.

The Commission having under consideration the manner in which the railway operating income applicable to the guaranty period is to be determined for the purpose of arriving at the amount payable under the guaranty provision of section 209 of the transportation act, 1920:

It is ordered, That the following accounting procedure be observed by all carriers accepting the provisions of section 209 of the transportation act, 1920:

1. With respect to carriers, which were under federal control as of February 29, 1920: The railway operating revenues, railway operating expenses, and other items of income comprised in "standard return," shall be allocated as between the guaranty period and the periods prior and subsequent thereto, in the same manner that such allocation was made between the federal control period and the periods prior and subsequent thereto. The accounting shall be as provided in paragraphs 3 and 5.

2. With respect to nonfederally controlled carriers: All items of railway operating expenses and other items of income other than railway operating revenue, classable under any of the accounts comprising the "standard return," shall be allocated with reference to the time when incurred or to which they are applicable, as between the guaranty period and the periods prior and subsequent thereto. All items of railway operating revenues shall be allocated as between the guaranty period and the periods prior and subsequent thereto, in accordance with the established revenue-accounting practices of the company in effect February 29, 1920, conforming to the commission's regulations. The accounting shall be as provided in paragraphs 4 and 5.

3. With respect to carriers which were under federal control: All items of income classable under any of the accounts comprising the standard return, which, under the provisions of paragraph 1, pertain to the period of federal control, shall be entered upon the federal books and excluded from the

corporate books. All similar items audited during the guaranty period which pertain to the period prior to federal control shall be distributed upon the corporate books to the appropriate primary accounts of the month in which audited. Items of the latter class, however, shall be so recorded as to readily permit the totals thereof for each month being stated separately.

4. With respect to nonfederally controlled carriers: All items of income classable under any of the accounts comprising the standard return, audited in the accounts during the guaranty period, which, under the provisions of paragraph 2 pertain to the period prior thereto, shall be distributed upon the corporate books to the appropriate primary accounts of the month in which audited. Such items, however, shall be so recorded as to readily permit the totals thereof for each month being stated separately.

5. With respect to all carriers: All items of income classable under any of the accounts comprising the standard return, which, under the provisions of paragraphs 1 and 2 pertain to the guaranty period, audited during the guaranty period and similar items which are audited in the accounts for the months subsequent to August, 1920, shall be distributed upon the corporate books to the appropriate
210 primary accounts of the month in which audited. The latter items, however, shall be so recorded as to readily permit the totals thereof for each month being stated separately.

6. Should any carrier state its income accounts on the basis of accruals through the employment of reserve accounts, such carrier shall file with the Commission notice of the adoption of the plan. All such reserve accounts shall be maintained in such manner as to clearly indicate the purposes for which raised and so as to readily reflect at all times the balance in each of such accounts.

7. Reserve accounts created to reflect accruals pertaining to transactions originating prior to March 1, 1920, and subsequent to August 31, 1920, shall be kept altogether distinct and separate from those reserve accounts created to reflect accruals pertaining to guaranty-period transactions. When any items to which reference is made in paragraph 5 and for which reserves have been created are audited, the amount thereof shall be charged or credited as appropriate to those reserve accounts relating specifically to guaranty-period transactions.

8. Any carrier stating its income accounts during any

portion of the guaranty period on the basis of accruals through the employment of reserve accounts may thereafter discontinue the practice only if so authorized upon application to the Interstate Commerce Commission. The carrier shall file with its application a statement of its reasons for desiring to discontinue the plan.

9. In computing railway operating income, or any deficits therein, for the guaranty period for the purposes of section 209 of the transportation act, 1920, no charges to income will be permitted which relate to transactions originating prior to March 1, 1920, or subsequently to August 31, 1920, whether such charges represent actual expenditures or credits to reserve accounts created to reflect accruals. Reserve accounts created to reflect accruals pertaining to guaranty-period transactions will be closed out or adjusted on basis of actual expenditures within such a reasonable time after August 31, 1920, as the Commission may determine. While the Commission is required by section 209 of the transportation act, 1920, to eliminate and restate operating expenses and revenues for the guaranty period, to the extent necessary to correct and exclude any disproportionate or unreasonable charge to such expenses or revenues for such period, or any charge to such expenses or revenues for such period which under a proper system of accounting is attributable to another period, the Commission is not authorized by such section to initiate any charge applicable to the guaranty period which does not appear on a carrier's books of accounts at the time of the guaranty settlement.

By the Commission, Division 4.

(Seal.) GEORGE B. McHINTY,
Secretary.

211 Appendix C.

Inventory as of August 31, 1920.

Interstate Commerce Commission,
Washington, August 23, 1920.

To carriers concerned:

Inquiries have been received as to whether the Commission will require an inventory to be taken of material and supplies on hand as of August 31, 1920, in connection with the determination of the amounts payable under section 209 of the transportation act, 1920.

In view of the fact that reliable information with respect to the operating expenses of the guaranty period, as affected by material and supply issues, can be obtained in no other way, the Commission will require carriers accepting the provisions of section 209 of the transportation act, 1920, to take an inventory of materials and supplies as of the close of business August 31, 1920, and adjust their accounts for the period March 1 to August 31, both inclusive, in the manner provided for in Case 2 of Accounting Bulletin No. 15.

With respect to carriers which were not under Federal control and which did not take inventories as of February 29, 1920, the amount of any discrepancy disclosed by the inventory as of August 31, 1920, should be apportioned between the guaranty period and the period prior thereto on basis of the material issues applicable to each period since the previous inventory was taken.

By the Commission, Division No. 4:

GEORGE B. McGINTY,
Secretary.

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Goot Ex. 6

Interstate Commerce Commission

Finance Docket No. 501

(This report also embraces Finance Dockets No. 463, Guaranty Settlement with Farmers Grain & Shipping Company, and No. 879, Guaranty Settlement with Watertown & Sioux Falls Railway Company)

Guaranty Settlement With Great Northern Railway Company and Affiliated Companies

Submitted October 30, 1924. Decided June 17, 1925

Amount necessary to make good the guaranty of section 209 of the transportation act, 1920, to the Great Northern Railway Company, the Farmers' Grain & Shipping Company, and the Watertown & Sioux Falls Railway Company, ascertained to be $11,178,887.31. An aggregate amount of $6,500,000 having been certified for payment as advances under paragraph (h), and an amount of $6,000,000 having been certified as partial payment under paragraph (g) of said section, as amended by section 212, the amount due the United States in final settlement is $1,321,112.69. Certificate issued.

George H. Hess, jr., for the carrier.

Report of the Commission

Division 4, Commissioners Meyer, Eastman, McManamy, and Woodlock

By Division 4:

The Great Northern Railway Company, the Farmers' Grain & Shippiing Company, and the Watertown & Sioux Falls Railway Company, hereinafter termed the carriers, are carriers by steam railroad which, during the guaranty period, engaged as common carriers in general transportation. Their lines of railroad were under Federal control from January 1, 1918, to February 29, 1920, inclusive, and they are therefore carriers within the meaning of paragraph (a) of section 209 of the transportation act, 1920. The carriers filed with us written statements accepting the provisions of section 209 prior to March 15, 1920.

The returns of the carriers under our orders of October 18, 1920, January 5, 1921, and December 15, 1921, together with supplemental data, have been examined and it has been ascertained that the debits and credits arising from the accounts called in the monthly reports to us "equipment rents" and "joint facility rents" have been included, and that there are included no debits or credits arising from the operation of street electric passenger railways or
213 interurbans not under Federal control at the termination thereof. In fixing the amount to be allowed for maintenance of way and structures and maintenance of equipment in the guaranty period we applied, so far as practicable, the rule set forth in the proviso of paragraph (a) of section 5 of the standard contract between the United States and carriers under Federal control. It has also been ascertained that the so-called war taxes have been assumed by the carrier in arriving at the net railway operating income or deficit for both the test period and the guaranty period, and that there are no eliminations necessary due to disproportionate or unreasonable charges, or charges attributable to another period, under a proper system of accounting. An estimate of the net effect of unaudited items has been made and agreed to under the provisions of paragraph (b) of section 212 of the transportation act, 1920. As a result of our investigation it has been ascertained that the amount necessary to make good the guaranty to the carriers is $11,178,887.31, as shown by the following statement:

Great Northern Railway Company

Basis of claim:		
Net railway operating income for the guaranty period		$884,323.64
One-half amount of annual compensation under Federal control act named in contract		14,306,522.65
Increase in compensation under section 4 of the Federal control act		631,599.48
Special claim for maintenance		2,334,052.12
Total amount claimed		16,387,850.61
Adjustments:		
Amount claimed based on section 4 of the Federal control act	$631,599.48	
Allowance based on section 4 of the Federal control act	474,411.95	
Deduction under section 4		157,187.53
Net railway operating income during the guaranty period, as claimed	$884,323.64	
Net railway operating income during the guaranty period, as adjusted	1,251,446.55	
Deduction for guaranty period		367,122.91
Deduction for special claim for maintenance		2,334,052.12
Amount claimed for maintenance of way and structures and maintenance of equipment	$25,899,242.40	
Amount fixed for maintenance of way and structures and for maintenance of equipment	23,815,780.74	
Deduction for maintenance		2,083,461.66
214 Deduction on account of items estimated by us and agreed to by the carrier under section 212 (b) of the transportation act, 1920		$374,256.85
Total deductions		5,316,081.07
Amount necessary to make good the guaranty		11,071,769.54

Farmers' Grain & Shipping Company

Basis of claim:		
Deficit in net railway operating income for the guaranty period		$35,530.71
One-half amount of annual compensation under Federal control act named in contract		2,472.28
Increase in compensation under section 4 of the Federal control act		12.57
Special claim for undermaintenance		4,340.09
Total amount claimed		42,355.65
Adjustments:		
Amount claimed based on section 4 of the Federal control act	$12.57	
Allowance based on section 4 of the Federal control act	12.17	
Deduction under section 4		.40
Deduction of special claim for undermaintenance		4,340.09
Amount claimed for maintenance of way and structures and maintenance of equipment	$46,171.97	
Amount fixed for maintenance of way and structures and maintenance of equipment	39,575.69	
Deduction for maintenance		6,596.28
Total deductions		10,936.77
Amount necessary to make good the guaranty		31,418.88

Watertown & Sioux Falls Railway Company

Basis of claim:	
Deficit in net railway operating income for the guaranty period	$64,104.67
One-half of amount of annual compensation under Federal control act named in contract	15,112.21
Increase in compensation under section 4 of the Federal control act	4,179.16
Total amount claimed	83,396.04

Adjustments:			
Amount claimed based on section 4 of the Federal control act....	$4,179.16		
Allowance based on section 4 of the Federal control act.....	84.25		
Deduction under section 4.....			4,094.91
215 Deficit in net railway operating income during the guaranty period, as claimed.....	$64,104.67		
Deficit in net railway operating income during the guaranty period, as adjusted.....	60,502.43		
Deduction for guaranty period.....			$3,602.24
Total deductions			7,697.15
Amount necessary to make good the guaranty..			75,698.89

Summary

Great Northern Railway Company.....	$11,071,769.54
Farmers' Grain & Shipping Company.....	31,418.88
Watertown & Sioux Falls Railway Company...	75,698.89
Total amount ascertained as necessary to make good the guaranty to the carriers	11,178,887.31

Certificates for advances under paragraph (h) and for partial payment under paragraph (g) of section 209, as amended by section 212, have been issued by us in favor of the carriers, as follows:

Advance, certificate No. 65, June 25, 1920.....	$3,000,000
Advance, certificate No. 225, August 31, 1920.....	2,000,000
Advance, certificate No. 276, November 4, 1920....	1,500,000
Partial payment, certificate No. 329, March 1, 1921.	6,000,000
Total.....	12,500,000

The amount due the United States, therefore, is $1,321,-112.69, for which an appropriate certificate will be issued.

Certificate No. A-1041 under Section 209 (g) of the Transportation Act, 1920

To the Secretary of the Treasury of the United States.

1. The Interstate Commerce Commission, hereinafter called the commission, hereby certifies that the Great Northern Railway Company, a corporation of the State of Minnesota, the Farmers' Grain & Shipping Company, a corporation of the State of North Dakota, and the Watertown & Sioux Falls Railway Company, a corporation of the State of South Dakota, hereinafter called the carriers, are carriers as defined in paragraph (a) of section 209 of the transportation act, 1920; and that the carriers filed with the commission on or before March 15, 1920, written statements that they accepted all of the provisions of said section 209 and that the two companies last mentioned individually filed with the commission resolutions passed by their respective boards of directors authorizing the Great Northern Railway Company to act as their agent in effecting settle-
216 ment under said section 209 and to receive payment of any sum or sums due them thereunder; said companies being under common control through direct or indirect ownership of their capital stock and composing a single system of transportation.

2. The commission has ascertained, and hereby certifies to the Secretary of the Treasury, that the amount of $11,178,-887.31 is the amount necessary to make good to said carriers the guaranty provided by section 209 of the transportation act, 1920.

3. The commission has heretofore certified to the Secretary of the Treasury as advances under section 209 (h) an aggregate amount of $6,500,000, as follows:

Certificate No. 65, June 25, 1920	$3,000,000
Certificate No. 225, August 31, 1920	2,000,000
Certificate No. 276, November 4, 1920	1,500,000

and as partial payment under section 209 (g), as amended by section 212, an amount of $6,000,000 on March 1, 1921, under certificate No. A-329.

4. The commission hereby certifies that the amount due the United States on account of overpayment to the carrier under section 209 (g) is $1,321,112.69.

5. The commission has made final determination as aforesaid of the amount of the guaranty provided for by section 209 of the transportation act, 1920.

Dated this 17th day of June, 1925.

By the commission, division 4.

[Seal] GEORGE B. McGINTY,
Secretary.

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217 Gov't. Ex. 7.

Interstate Commerce Commission

Finance Docket No. 501

(This report also embraces Finance Docket No. 463, Guaranty Settlement with Farmers' Grain & Shipping Company, and Finance Docket No. 879, Guaranty Settlement with Watertown & Sioux Falls Railway Company.)

Guaranty Settlement With Great Northern Railway Company and Affiliated Companies

218 Submitted January 16, 1926. Decided June 8, 1926

Upon argument and further consideration, amount necessary to make good the guaranty of section 209 of the transportation act, 1920, to the Great Northern Railway Company, the Farmers' Grain & Shipping Company, and the Watertown & Sioux Falls Railway Company, ascertained to be $11,277,331.79. An aggregate amount of $6,500,000 having been certified for payment as advances under subdivision (h), and an amount of $6,000,000 having been certified as a partial payment under subdivision (g) of said section, as amended by section 212, the amount due the United States in final settlement is $1,222,668.21. Certificate issued under date of June 17, 1925, amended. Original report, 99 I. C. C. 231.

M. L. Countryman, Walker D. Hines, and F. G. Dorety for the carriers.

Report of the Commission on Argument and Further Consideration

By the Commission:

In the original report in this proceeding, by division 4, 99 I. C. C. 231, the amount due the carriers under section 209 of the transportation act, 1920, was found to be $11,178,887.31, and the amount overpaid $1,321,112.69. A certificate was issued to that effect. The carriers thereafter filed petition for reopening and argument before the commission. Pursuant to the petition, the proceeding was reopened for argument, which was heard on January 7, 1926. By permission, a memorandum supplemental to the oral argument was also filed and has been considered. The Great Northern Railway Company and its subsidiaries, the Watertown & Sioux Falls Railway Company and the Farmers' Grain & Shipping Company, will be collectively referred to as the carrier.

The carrier's principal contentions concern our action in fixing an amount to be included in operating expenses for maintenance of way and structures and of equipment in the guaranty period. In order to obtain a fair view of the carrier's contentions in this regard, in their relation
219 to the administration of the section as a whole, a general statement is necessary.

Subdivision (g) of section 209 made it mandatory upon us "as soon as practicable after the expiration of the guaranty period," to "ascertain and certify to the Secretary of the Treasury the several amounts necessary to make good the foregoing guaranty to each carrier." It is obvious that the amounts necessary to make good the guaranty to the several carriers could not be determined until after the close of the guaranty period and the closing of the books of accounts of the carriers with respect to the charges attributable to that period, and until we had determined the principles which should govern final settlement.

Subdivision (h) of section 209 gave us discretion to certify advance payments during the guaranty period or thereafter upon applications filed by the carriers during that period and provided, among other things, for the execution of contracts in which the carriers agreed to refund any sums advanced in excess of the amount finally found due under the guaranty. Immediately after the passage of the act, many of the carriers applied for such advance payments, and they were certified from time to time during the guaranty period to an aggregate amount of about $254,000,000,

including $6,500,000 to the Great Northern Railway Company. These advance payments were based upon sworn statements submitted by the carriers and upon other available data, such as annual and monthly reports on file with us.

The necessities of the carriers continued after the termination of the guaranty period, but the law apparently did not permit payments under subdivision (h) unless applications therefor had been filed during the guaranty period. In the case of some carriers, no such applications had been filed. In many cases in which advances had been made it appeared, from such estimates as were practicable at that time, that the amounts necessary to make good the guaranty would permit of additional payments. In view of the necessities of the carriers and the urgency of their requests for further payments, we recommended to Congress such legislation as would meet the situation, and in response thereto Congress enacted section 212 of the transportation act, 1920, effective February 26, 1921, which provided for partial payments. Under this authority we certified additional payments to numerous carriers, aggregating about $169,000,000, in which is included a certificate for $6,000,000 in favor of the Great Northern Railway Company, issued on March 1, 1921, three days after section 212 became law.

When these certificates for partial payments were issued, there were certain questions with respect to the in-
220 terpretation of section 209 which we had not finally determined, nor were the books of accounts of the carriers closed with respect to the charges attributable to the guaranty period. Hence final ascertainments of the amounts due under the guaranty could not be made. While the certificates issued for partial payments were definite in form, they were necessarily based upon the facts as then known. For us to have declined to issue such certificates until the facts were definitely and finally ascertained would have defeated the purpose of the law. These certificates rested principally upon the sworn responses of the carriers to our order of October 18, 1920, which called for statistical data relating to revenues, operating expenses, ton-miles, car-miles, etc., designed to aid in a comparison between the test-period and guaranty-period operations and costs. The intent in these certificates was to leave an ample margin still due and uncertified to protect the interest of the Government, and in the great majority of cases the margin so left proved sufficient for the purpose. Usually, at this time, the carriers computed the data called for by our order of October 18, 1920, in accordance with a formula prepared by the Association of Railway Executives, which represented

the theory of the carriers for making proper allowance in the maintenance accounts for increased prices and for changes in amount and use of property. Thus, substantially under this formula, the carrier, under a return filed February 9, 1921, claimed $18,498,391.67 as the amount necessary to make good its guaranty. We had previously certified to advances aggregating $6,500,000, and on March 1, 1921, certified a partial payment of an additional $6,000,000, a total of $12,500,000, leaving an apparent margin of about $6,500,000. On March 26, 1921, the carrier submitted a revision of its return computed entirely in accordance with the railway executives' formula, showing $18,645,653.32 as the amount necessary to make good its guaranty. Later the carrier filed a return, designated as final, in which it claimed $17,599,756.42 as the amount due. But by brief of July 2, 1925, it stated that $15,705,688 was approximately correct and that the amount found due should be "at least $15,000,000," although it prayed in the same brief that we issue a certificate "declaring that no refund is due from the carrier and that there still remains due to the carrier under the guaranty such additional amounts as the Commission may determine," thus indicating a minimum claim of $12,500,000, the amount already paid, plus as much more as might be considered reasonable and just.

At the time of the certificate of March 1, 1921, our interpretation of the law and the method of procedure under it were under consideration. Final conclusions were
221 later reached, after long and careful deliberation and with the aid of arguments and conferences in which the carriers had full opportunity to present their views, and were announced in two reports, namely Maintenance Expenses under Section 209, issued July 12, 1921, 70 I. C. C. 115, and Final Settlement under Section 209, issued December 15, 1921, 70 I. C. C. 711.

Ascertainments under the principles announced in these reports resulted in materially smaller allowances for maintenance in the guaranty period than had been claimed by the carriers under the formula of the railway executives. Our conclusions differed from that formula chiefly in the use of a general equation factor instead of separate factors for each group of maintenance expenditures, in the disallowance of claims based on so-called inefficiency of labor, the use of purchase instead of charge-out prices, the use of separate factors for new and scrap materials, and in the treatment of adjustments for differences in amount and use of property. From time of announcement, our treatment of differences in amount and use of property has been

very generally accepted by the carriers, but the largest claims of this carrier arise out of another method by which it would have us compute these adjustments. Protests against our treatment of labor, prices, and scrap, which, if conceded, would have precluded the use of a general equation factor, after hearing and argument were found in Treatment of Salvage, Piecework, and Prices, 82 I. C. C. 678, to have insufficient merit to warrant any change in our adopted procedure. The recognition of other claims of the carrier would require us to reverse our finding in the last-cited report, and, in consequence, to reverse our findings in 70 I. C. C. 711, and 70 I. C. C. 115.

The making of the certifications for partial payments before field check could be made of the sworn data submitted by the carriers, and prior to the final determination of the principles governing the guaranty payments, led to overpayments to 35 carriers. Of these, 28 have reached final settlement, 22 have refunded the overpayment or promised to do so, and 6, including the carrier, have neither repaid nor promised to repay.

The carrier alleges various errors of fact and law, which may be stated in substance as follows:

I. It is alleged that, in arriving at the equation factor representing the increase in prices of labor and materials in the guaranty period as compared with the test period, we failed to give sufficient consideration to the particular circumstances surrounding the carrier's operations.

222 Among the special circumstances alleged to support a greater factor than determined by us are—

(a) Geographical location and consequent effect of climatic conditions.

(b) Exceptional condition in regard to the portion of the maintenance work done in the six months of the guaranty period as compared with the remaining part of the year.

(c) Exceptional distribution betwen maintenance of way and structures and maintenance of equipment charges.

(d) Exceptional distribution between, and in, the several groups of materials as such and labor as such.

(e) Exceptional prices paid for materials and labor, differing from those paid by other carriers.

(f) Exceptional condition in regard to brass as affecting the factor.

In urging these exceptional conditions the carrier insists that its own operations and prices must be controlling, and

under a rigid rule or formula endeavors to support a factor of 2.57 to replace our factor of 2.45. In this connection it lays stress upon comparisons it has made between its claimed factor and the factors used by us in settlement with other carriers in its territory.

II. The carrier alleges that we failed to give proper consideration to the increase in amount of property used by it in transportation service in the guaranty period as compared with the test period, particularly in the increase in joint-facility property, and in this connection urges that for additions and betterments the prices used should be as of the dates of the contracts instead of the dates the expenditures were audited.

III. The carrier alleges that we failed to make sufficient allowance for increase in amount and use of equipment and motive power in the guaranty period as compared with the test period. In this connection it claims that we failed to base the allowance upon the actual conditions existing on its lines, particularly as to the use of owned cars and foreign cars, and that in considering the use of owned cars on other lines we used the average car mileage of the country at large instead of the average car mileage in the territory of the carrier and its immediate connections.

In general, the carrier insists that the amount to be included for maintenance must be determined by its own performance, including its own prices, in the test and guaranty periods, by its own distribution of charges as between materials as such and labor as such, and by its own allocation of these charges to the various accounts; that in computing the effect of the changed condition, separate factors must be determined for each individual item and account, with specific allowances for crossties, rails, freight-car materials, locomotive materials, section labor, bridge labor, labor of mechanics, etc., and that the result so obtained must be combined into an equation factor under a
223 rigid rule or formula of its own selection. We said in Maintenance Expenses under Section 209, supra, at page 122:

It appears that after setting forth in general terms the obligation of the director general with regard to upkeep, it became necessary to fix some practicable method by which his compliance with this covenant might be measured. The proviso [paragraph (a) of section 5 of the "standard contract"] was the method definitely agreed upon by the parties. In essence it provides that the annual expenditure,

or payment into funds, of sums for maintenance during Federal control equal in the aggregate, after equation in accordance with paragraph (c), to the corresponding sums spent or reserved during the test period "shall be taken as a full compliance with the foregoing covenant."

We went on to say:

We are clear that it was the purpose of this proviso to provide a simple and easily applied test which would make it possible to measure compliance with the covenant by resort to the accounts of the carriers and without the prolonged controversy which would follow any method involving physical inspection or opinion evidence. In other words, it was the purpose to employ what has been called an "accounting" test rather than an "engineering inspection" test.

What we have done is to determine from all the evidence before us an equation factor, in accordance with the provisions of paragraph (c) of section 5 of the "standard contract," which, when applied to the amount spent for maintenance proper during the test period, would produce during the guaranty period, under honest, economical, and efficient management, the equivalent of that test-period expenditure. We have not determined a specific allowance for crossties, rails, section labor, etc., and the result obtained by multiplying the test-period charges in any specific account by our general equation factor has no significance. That factor is a composite factor applicable only to the maintenance expenditures proper of the test period in their entirety.

We further said in the same report as follows:

For the most part these claims [of the carriers] have been based on a formula devised by a committee of accounting officers and engineers representing the Association of Railway Executives. More recently another formula has been devised after conferences between representatives of the carriers and representatives of our bureau of finance. But both these formulae are based upon the theory that changes in the ratio of maintenance expenditures for labor and for materials, so far as they are not accounted for by differences in prices and wages, necessarily reflect changes in the quality or effectiveness of labor. This theory presupposes a degree of similarity, in two given periods, between the kind of work and the conditions under which it is performed which no formula can establish and which the very nature of maintenance makes improbable, particularly when

the comparison is between an average six months of a three-year period and the six guaranty months of the year 1920. The incongruous results which such a formula will produce may easily be shown.

224 After five months of further deliberation, aided by computations under other formulae, we reached this conclusion, in Final Settlement under Section 209, supra:

We are of the opinion that the allowances for differences that may exist between the cost of labor and material for the test period and for the guaranty period, respectively, can not practicably be made upon the basis of any rigid rule or formula, but these allowances must be fixed by us in the exercise of a reasonable judgment upon consideration of all the relevant facts and circumstances.

We further found, in Final Settlement under Section 209, supra, in reference to the manner of computing the guaranty allowance for maintenance, as follows:

There shall first be deducted from the maintenance expenses of the test period all amounts included therein for (a) depreciation, (b) retirements, and (c) insurance.

The remainder, after being adjusted for differences in amount and use of property maintained, shall be multiplied by a factor representing the increase in the general level of cost of labor and material for the territories in which the lines of railway of the carrier are situated. To the product thus arrived at shall be added back the deductions hereinabove provided for, adjusted for differences in amount and/or use of property maintained. The resulting sum will be the amount to be fixed by us as that which shall not be exceeded in charges to operating expenses for the purposes of the guaranty for the aggregate of maintenance of way and structures and maintenance of equipment. The methods of adjustment for differences in amount and use of property are indicated separately for maintenance of way and structures and for maintenance of equipment in the forms hereto annexed.

In Treatment of Salvage, Piecework, and Prices, supra, this matter was further elucidated, on page 679, as follows:

In the same report [Final Settlement under Section 209, 70 I. C. C. 711, 715] we announced that carriers would be required, in submitting their claims or statements, to report the increase in cost of labor and material for their respective territories, but were informed that the prices actually paid

by them might not represent the increase in cost for which the law required "due allowance" to be made. In explaining this qualification we said, "What we construe the proviso to mean and what we find to be practicable in a settlement of these matters contemplate a determination of changes in the general levels of cost of labor and material beyond the carrier's control." In administering this principle, we have given consideration to and have made allowance for special conditions affecting individual carriers which were not applicable to other carriers operating in the same general territory. We further announced our conclusion that such determination could not practicably be made upon the basis of any rigid rule or formula, but that the allowance must be fixed in the exercise of a reasonable judgment upon consideration of all the relevant facts and circumstances.

From our investigation and studies we arrived at the conclusions that while there might be unusual conditions affecting the carriers in a particular region, which conditions were beyond their control, nevertheless the
225 effect of such conditions, being general, would be reflected in the territorial factor, and at the same time we recognized that conditions affecting an individual carrier in such region might not only be unusual and beyond its control, but might be different from those affecting the carriers generally in that territory and that such conditions should be reflected and given weight in the equation factor used in the settlement with the individual carrier.

I

The line of the Great Northern is the most northerly in the United States. For this reason the carrier claims that it is adversely affected by weather conditions to a much greater extent than any other carrier in its territory. The monthly charts of the United States Weather Bureau for the periods involved show a maximum difference in temperature on the line of the Great Northern as compared with that on the lines of other carriers in its territory of only 5°. The average difference in temperature in all probability did not exceed 2°. We are not persuaded that the geographical location of the carrier caused its maintenance conditions to be materially different from those of the other lines in its territory.

It may be admitted, as the carrier claims, that it expended relatively more for maintenance during the guaranty-period months than during the remainder of the year, but the other

carriers in its territory did the same, so that this can not be a condition affecting the carrier and not the other carriers in its territory. The carrier advances this circumstance in connection with its contention for an increased equation factor. Whether the carrier spent more or less for maintenance during the months of the guaranty period than during the remainder of the year would have no effect upon the equation factor representing the general increase in prices of materials and wages of labor. In any event, such a claim could not be considered, because the law definitely fixes as a base the average six months of the three-year test period.

The carrier contends that in determining its maintenance allowance an equation factor should be used that is greater than the average for the territory in which it operates, because of the exceptional distribution of its charges during the test period between maintenance of way and structures and maintenance of equipment, and also because of exceptional distribution between expenditures for labor and expenditures for material. The increase of prices in the guaranty period as compared with the test period was not so great for certain materials as for others, nor was it so great in the case of most prices as in the case of wages, and there were like differences as between the wages of various groups of employes. It therefore follows that different distributions of the same total expenditure in the test period, as between material and labor and as between various forms of maintenance work, will produce different composite equation factors.

226

The distribution of the maintenance expenditures of the carrier during the test period has been given consideration and has been one of the circumstances leading us to allow the carrier an equation factor somewhat higher than the general territorial level. But the effect of such distribution can not properly be measured by rigid formula, as proposed by the carrier, for a number of reasons. There is no provision in our accounting rules for an accurate distinction between labor as such and material as such. What may appear as differences between the proportion of labor and material to the total expenditures as between carriers, may in reality be mere differences in nomenclature, that which is called labor by one carrier being termed material by another. The practices of the carriers in this regard vary. Moreover, the analysis of distribution as between different kinds of maintenance and as between labor and material is so complicated and difficult a task that in practice not all items are analyzed. Certain items of material are selected

by the carrier as representative of prices of different classes; from these, ratios of increase or decrease are computed. The remaining similar items, or items considered to be in the same class, are assumed to change in the same proportion. The results of such analysis are only approximate. The distribution also varies from year to year, and any rule which attempted to base equation factors on the exact distribution during the test period would lead to uneven and unjust results for the guaranty period.

It is clear that the entire purpose of the proviso of the standard contract was to adjust expenditures in the aggregate. The plain terms of the proviso so stated. The determinations of increase in general levels of cost must be determinations in the aggregate. The method of this determination was given thorough consideration in the cases which have been cited. The principles there enunciated have been followed in the many settlements with carriers which have since been effected, and the same principles are being followed here. No good reason has been advanced for the adoption at this late date of different principles.

In regard to the contention of the carrier that it paid exceptional prices for materials and for labor differing from the prices paid by other carriers in its territory, it appears that the carrier's test period prices and rates of pay were in some instances lower than those of other carriers. However, a lower test-period price reported by one carrier than by others for apparently the same article may be due in whole or in part to differences in quality or grade. Moreover, although, as stated, some of the carrier's test-period prices for materials and wages of labor were lower than the average in its territory, others were higher, the same being true of the guaranty period. In the aggregate, the change in the general level differed only slightly from the average of the territory as a whole. It is also evident that in some instances the high guaranty-period rates claimed by the carrier for labor were produced, among other things, by the inclusion of large amounts of overtime pay at penalty rates.

227

In regard to the carrier's claim, based on a special analysis of brass and journal bearings, for an increase in the equation factor for equipment material, this claim could not be given consideration without abandoning the use of a general equation factor and adopting the impracticable principle of separate equation factors for each item and group of accounts. In view of our former holding in Maintenance Expenses under Section 209, Final Settlement under

Section 209, and Treatment of Salvage, Piecework, and Prices, supra, it would seem unnecessary to discuss this contention. However, if we could accept the principle of separate equation factors and if it were practicable to develop such factors, we could not accept the results here claimed by the carrier for the reason that for the test period the carrier has used assumed prices for new and for scrap brass which were materially below the market price, while for the guaranty period it has used the market price of this brass thus producing a disproportionate increase which in no way indicates the change in the general level of prices but rather gives the relation between a low test-period price arbitrarily fixed by the carrier, without regard to prevailing prices, and the normal guaranty-period price. Incidentally, in pricing rail the carrier reversed the above process, in that it used an arbitrary price for used rail, unsupported by prevailing prices, in the guaranty period.

The carrier argues the injustice of the use of a territorial factor and insists that it has been denied an opportunity to see the analysis of the facts upon which our factor is based. Our territorial or regional factor represents our judgment of the composite increase in the general level of the prices of materials and wages of labor in the carrier's territory. It has not been and can not be divided into separate factors for each of the items which go to make up the aggregate expenditures, but rests upon all of our studies in connection with this subject, after review of data from various carriers and all other sources, and after consideration of all other relevant facts and circumstances ascertainable. The burden is upon the carrier to show that there existed on its lines unusual conditions beyond its control and
228 differing from those on the lines of other carriers in its territory, in order that it may be taken out of the general class and assigned a higher or a lower factor. After giving weight to the special conditions on the line of the carrier for which due allowance should be made, we have used in our final ascertainment a factor five points higher than the territorial factor.

As stated above, the carrier has endeavored to support its claim for a higher factor than that used by us by a comparison of its performance with that of the Chicago, Milwaukee & St. Paul, the Northern Pacific, the Chicago, Burlington & Quincy, the Chicago & North Western, and the Minneapolis, St. Paul & Sault Ste. Marie. The comparisons presented lack force for the following reasons:

(a) Each of these comparisons is based on the so-called

director general's or Laspeyres' formula, which we ruled against in Maintenance Expenses under Section 209, and again in Final Settlement under Section 209, supra.

(b) The factors the carrier uses for other carriers in its comparisons are not shown to be the result of applying this same formula. As a matter of fact, the factors used are those applied by us in final settlement with these other carriers, and as they are judgment factors, arrived at independently of any rule or formula, they can not be broken down into integral parts for substitution in the formula noted in (a) above, as the carrier has done. The result of such a comparison is untrustworthy.

(c) The effect of the carrier's actual distribution of quantities is not necessarily shown by substituting its quantities in another carrier's factor development, even under a fixed rule, because neither carrier may have selected the same nor a representative set of quantities of materials and of labor in its individual computation of group factors. To illustrate this, there is shown below a comparison between this carrier's analysis and that of the Northern Pacific relative to gross material analyzed in certain groups.

Group	Great Northern	Pacific Northern
	Per cent	Per cent
Rail	76	100
Ballast	73	101
Track material	54	80
Locomotive material (approximate)	30	40
Freight-car material	66	77

It is evident from the above that although the prices are the same, the group factors would be different simply because of the difference in selection of materials.

229 II

Before the adoption of our present method of determining the adjustment for differences in amount and use of way and structures property between the test and the guaranty periods, respectively, we found it impracticable to compare miles of track with miles of track, station buildings with station buildings, steel bridges with steel bridges, wooden trestles with wooden trestles, roadway buildings with road-

way buildings, etc., because each item and subdivision would require a different unit of measure and because the accounts of the carriers, under our rules, were not kept in a manner which made it possible to segregate maintenance charges to each of these very numerous and varied items. The only theory which seemed to afford a practicable working basis we found to be that a dollar of equal purchasing power would purchase the same amount of like facilities in the test and in the guaranty period, and that this would require an equal expenditure of such dollars for maintenance. Our adjustment for amount of way and structures property is based upon this broad assumption, with knowledge that the result may not be absolute, but with the assurance that the carrier is given the benefit of all the doubts, it being a generally accepted fact that the vast majority of additions and betterments to way and structures are undertaken because they will reduce operating costs and are justified in many instances by decreased maintenance expenses. Thus, our settlement includes an increased allowance for maintenance directly proportionate to any increase in investment, stated in dollars equated to the test period, although many of the investments are made to bring about a decrease in maintenance expense. Attempted refinements by segregation and separation of small classes of the innumerable items involved have only the appearance of greater accuracy. Unless all items could be so segregated and separated, and the effect of changes in each computed independently, the result would no more nearly approach the truth than does the broad general principle under which we work.

The carrier proposes to compute the equation factor used in reducing the investment added after the test period to a basis comparable with the investment of that period by reckoning from the time of signing the contract for the work, or the time when the work was performed, if done on a cost-plus basis, rather than from the date of audit when the investment was entered in the account. What is said above is a sufficient answer to this refinement. The carrier further proposes to state its investment in road by adding to the recorded amount the value which it claims for that part of the facilities of other carriers used by it under joint-facility
230 agreements, and by deducting the value which it assigns to that part of its own property which is used by other carriers under similar agreements. The joint-facility rentals paid by the carrier, whether covered by a lump-sum contract or by a contract based on relative use, are divisible as between maintenance and other charges, and the mainte-

nance portions are included in its test-period expenditures for maintenance, which are equated and of which the carrier has the benefit. To attempt an allowance for net charges in the amount of joint-facility property is an unwarranted refinement, for the reasons above stated.

In the maintenance adjustments claimed by the carrier for use of way and structures property, it would have us make separations between the effect of line-haul and yard switching. While this carrier represents that it has made a separation between its line-maintenance charges and its yard-maintenance charges, our classification of operating expenses, prior to January 1, 1920, did not require such a separation of charges, but merely made such separation permissive. An insignificant number of carriers, if any at all, attempted it. Effective January 1, 1920, such a separation was required in an endeavor to determine the separate costs of freight and passenger service. This, however, could not generally be used in the guaranty-period ascertainments because there was no such separation in the test period with which to make comparison. However, if we grant that the carrier has made a separation of such charges in the test as well as in the guaranty period, we are of the opinion that no advantage of nearer approach to accuracy is to be had by attempting separate adjustments than by the method we follow, for the reason that according to our investigation the relation between line-haul and yard switching is approximately constant. This being true, having determined the relative difference in either as between the two periods, the difference in each is ascertained. We have adopted the line haul as our measure, for the reason that the data for line haul, while not exact, permit a more definite and reliable ascertainment than the data for yard switching.

Nor are the arguments advanced by the carrier in regard to the effect of its ore traffic on the amount which should be included in this switching adjustment convincing. It may be true that the increase in ore business in the guaranty period over the test period was material, yet there is no reason why this increase should have disturbed the relation between line-haul and yard switching. No apparent difference in the length or character of line haul has been shown, and no apparent difference has been shown in the manner of handling cars in the yards in the two periods. In the formulae adopted by the adjustment committee of the Association of Railway Executives, which the carrier has sometimes
231 followed, attempt was made at many arbitrary separations and refinements, such as the carrier now advo-

cates, under the theory that such separations and refinements tended to greater accuracy of results. In our analysis of these formulae it was definitely shown that such was not the case, and it was and is our opinion that, because of the arbitrary separations which had to be made in the book charges, which were not required and were not kept under our accounting rules, more inaccuracies were developed than were corrected by such attempted refinements.

III

In its special claims for additional allowances for differences in amount of equipment in the guaranty period as compared with the test period, the carrier wishes us to depart from an aggregate settlement by making separations between its different classes of cars and by applying particular equation factors to these classes. This is opposed to our procedure, and if it were not so, we could not accept the claim of the carrier, for the reason that it has modified its results by eliminating, for the purpose of its computations, locomotives and cars that were stored for short periods of time during slack business conditions, and thereby has not included in its tonnage all of the locomotives and cars that were active.

With particular reference to adjustment for differences in amount of freight-train car property, the carrier has supported its claims, first, by formulae of its own, then by formulae of the adjustment committee of the Association of Railway Executives, and in various other ways. The results of some of these nearly approach its actual expenditures and that is the amount for which it finally asks. We have been unable to find any exceptional conditions on the lines of the carrier beyond its control and different from those existing on the lines of other carriers in its territory for which allowance should be made. The carrier, in its special claims, relies upon a particular and not an aggregate adjustment. It would have us separate its cars into classes and make a particular adjustment for each class, based on separate equation factors for each class, to be applied to separate charges allocated to that class. It also asks a separate adjustment for amount of equipment and for its use, which we have found to be impracticable because of the manner in which accounts for freight-train car repairs are kept. Our adjustments are made for amount and use of equipment on the principle which we outlined in Final Settlement under Section 209, supra, which is that, the use remaining constant, the maintenance expenses for amount of property vary

directly with and as the amount of property maintained, and that the result thus obtained must be either increased or decreased in accordance with the relative intensity of
232 use of the property in the two periods. The final result is an aggregate adjustment for amount and use. The carrier, in its proposed adjustment, complies with only the first step of the above procedure, and this alone would preclude the acceptance of its proposal because of its incompleteness. Further, it would be obviously unfair, under the use of a general equation factor for all classes of property, many of which would require particular equation factors less than the general factor, to pick out a few selected classes having high particular equation factors and to adjust these according to such factors and at the same time adjust all other classes by our general equation factor, which has in it the influence of these high equation factors also.

We think it appropriate to mention here, while it has no effect on the factor, that the carrier has advanced the claim of an equity on account of per diem charges being directly credited to railway operating income, and has stated that the Government receives a direct benefit from such accounting. This is a confusion of the effect of our accounting rules. It makes no difference whether the per diem is taken directly into the accounts as income or whether it is separated into its various elements and so included in the accounts; under proper accounting, the net railway operating income indicated is the same.

In its claim for adjustment for differences in use of freight-train car property the carrier relies, first, upon the differences in the dispersion of cars in the test and in the guaranty periods, respectively; that is, in the different proportion of owned cars on its own lines and on the lines of other carriers in the two periods. We can not consider such a claim, for the reason that the effect of such interchange of cars is an intercarrier matter, the adjustment of which is provided for and effected through the application of the per diem and m. c. b. charges promulgated and adopted by the carriers themselves to provide for the very situation which gives rise to the claim. It is within the carriers' control and has no place in the guaranty settlement. Second, the carrier relies upon what it asserts to be the mileage of its own cars on its own lines, which differs from the mileage of foreign cars on its own lines, and upon what it alleges to be the actual mileage of its own cars on foreign lines. It may be possible that the carrier is able to determine the mileage of owned and foreign cars on its own line. We have been unable to find

any method by which, or statistics from which, the alleged separate mileage for owned cars on foreign lines may be obtained. We have adopted and follow in our settlements the principle that the difference in use of freight-train cars is represented by the differences in car-miles per car in the periods under comparison. As the matter of car-miles is
impossible of exact determination, we have assumed
233 that the average aggregate miles per car of all cars on
the carrier's lines would represent the car-miles per car of owned cars at home, and that the average aggregate car-miles per car of the country at large would represent the car-miles made by owned cars on foreign lines. The theory of the carrier would substitute its assumption for the one which we have made and which has been generally accepted and has been used in all of our settlements. Here, again, the carrier does not follow its assumption to its logical conclusion. The result is dependent, not only upon the variable of car-miles per car, but on the number of cars, upon the proportion of cars on and off line in each period, and upon the mileage at home and abroad in each period. Taking all these things into account as far as possible, and following the assumption of the carrier through to its conclusion, the result under this assumption will differ from the result which we have obtained and the adjustment which we have proposed by a negligible amount.

The carrier has, from time to time, made claim for special adjustment on account of the maintenance of newly constructed lines put into service immediately prior to or during the test period. We have denied similar claims in the case of a number of other carriers with which final settlement has been made. If we should disregard our previous decisions, we should still be forced to deny the claim of the carrier. Its claim approximates its purported actual expenditures for maintenance of way and structures for these lines. However, its claim rests on the performance of only slightly more than one-half of its newly constructed lines. It is not known what would have been the effect if all of its newly constructed lines had been included in its computation. Further, in order to accomplish the result desired by the carrier, it would be necessary to restate the test-period expenditures for maintenance for these lines, which, as we have before stated, we can not do under the provisions of the law. If, as the carrier claims, its charges for this maintenance during the test period were below normal, it follows that its income was proportionately larger than it would have been had the normal maintenance been applied. As an equity in the case, although we consider the settlements with the director general and

under section 209 as separate and distinct transactions, the carrier has received the benefit of a larger income on account of these new lines, not only during the guaranty period but also during the entire period of Federal Control. In support of its claim in this regard, it is stated that it was in an unusual situation, having the greatest amount of newly constructed lines of any carrier in its territory. We find, however, from statements furnished by the carrier, that for the period 1909 to 1916, both years inclusive, the carrier had an increase of new lines amounting to 19.7 per cent of its
234 mileage, the Chicago, Milwaukee & St. Paul 35.7 per cent, the Northern Pacific 5.4 per cent, and the Minneapolis, St. Paul & Sault Ste. Marie 26.9 per cent, representing an average for the last three lines of 22.8 per cent, from which it does not appear that the carrier had an unsual increase in mileage in the years immediately preceding the middle of the test period as compared with other lines in its territory.

We have had the general and special claims of the carrier before us for a long time and have considered and given such weight as in our judgment seemed proper to each of the claims made by it. In consequence, in our final ascertainment we have used a factor of 2.45, five points above the territorial factor. In discussing somewhat similar contentions in Treatment of Salvage, Piecework, and Prices, supra, we said:

What we construed the law to require, and what we did, was to adopt such a general plan of procedure as in our opinion would secure the greatest measure of justice to the carriers, individually and collectively, and protection to the Government as could be secured with the force and means at our disposal.

In urging claims based upon special circumstances, it is reasonable to assume that the carriers have selected such as appear to favor them rather than those which, if specially treated, might favor the Government. One important circumstance of the latter class may be mentioned. By this contract with the railway companies, the director general was bound to return to them at the end of Federal control material and supplies similar in amount and kind to those taken over at the beginning of Federal control, or to make good to the carriers by payments of cash at prices current on March 1, 1920. The actual cost of material and supplies delivered to the carriers at the end of Federal control was, therefore, the price of the material and supplies as of December 31, 1917, or earlier. Nevertheless, the carriers, following

their usual practice, charged into their expense accounts such material and supplies as were used by them at prices current in the guaranty period, thus overstating their actual operating expenses and increasing thereby the deficits to be made up under the guaranty of section 209, and also thereby increasing the apparent change in cost to them between the prices of the test period and those of the guaranty period, respectively. This condition was referred to in our report in Treatment of Salvage, Piecework, and Prices, supra, where we stated that it was not deemed practicable to allocate the material in question and to apply cost prices thereto, although it might be assumed that the carriers had substantially profited by the omission. It is admitted by this carrier in
235 its final brief that the charge in its guaranty-period expense accounts due to this cause was about $900,000.

We find nothing in the circumstances of this carrier to justify a greater allowance based upon the contentions stated under I, II, and III. There are, however, other contentions of different nature.

IV

It is alleged that our allowance under subdivision (c), paragraph (1), of section 209, based upon increase in compensation by the director general, provided for in section 4 of the Federal control act, was insufficient, in that we included only that part of the cost of additions and betterments expended during the Federal control period and excluded expenditures incurred prior to the Federal control period for improvements which were completed and put in operation during Federal control.

Section 4 of the Federal control act provides, in substance, that the compensation of carriers under Federal control, which was measured normally by the average railway operating income during the test period, should be increased by an amount reckoned at a reasonable rate per cent, to be fixed by the President, upon the cost of additions and betterments made by the carrier with the approval of or by order of the President while the property was under Federal control. Section 209 of the transportation act refers to this provision in subdivision (c), paragraph (1), as follows:

The United States hereby guarantees—

With respect to any carrier with which a contract (exclusive of the so-called cooperative contracts or waivers) has been made fixing the amount of just compensation under the

Federal Control Act, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one-half the amount named in such contract as annual compensation, or, where the contract fixed a lump sum as compensation for the whole period of Federal operation, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than an amount which shall bear the same proportion to the lump sum so fixed as six months bears to the number of months during which such carrier was under Federal operation, including in both cases the increase in such compensation provided for in section 4 of the Federal Control Act.

Further reference to section 4 of the Federal control act is found in subdivision (c), paragraph (3), and subdivision (d) of section 209, from which it clearly appears that the amount to be allowed by us under section 209 in recognition of said section 4 is one-half the annual sum fixed by the President under that section. This construction we adopted in Final Settlement under Section 209, supra. The rule has been followed in this case. Under the contract between the carrier and the director general, the carrier waived interest
236 on cost of additions and betterments made by the corporation and uncompleted December 31, 1917.

V

Our report of June 17, 1925, shows an amount of $31,418.88 due the Farmers' Grain & Shipping Company and an amount of $75,698.89 due the Watertown & Sioux Falls Railway Company. These amounts were applied as offsets to the amount due from the Great Northern Railway Company, the certificates showing only the difference due from the latter company. It is claimed by the carrier that separate certificates and settlements should be made.

The report issued under date of June 17, 1925, shows clearly the finding as to the amount due to or from each of the carriers involved. These findings were combined in one certificate in conformity with the practice in dealing with groups of carriers constituting systems. The certificate recited that the two companies had individually filed with us resolutions passed by their respective boards of directors authorizing the Great Northern Railway Company to act as their agent in effecting settlement under section 209, and to receive payment of any sum or sums due them thereunder, said companies being under common control through direct or indirect ownership of their capital stock and composing a single system of transportation.

In order that our certificate may convey to the Secretary of the Treasury all of the information needed for his guidance in concluding settlements with the carriers, it will be amended to show the amount necessary to make good the guaranty to each of the carriers involved, as well as the payments certified. Whether or not the Secretary of the Treasury should, in the light of the facts, treat the carriers individually and without reference to their common control and operation is a question for his determination.

VI

It is alleged that there were included in the railway operating income accounts of the Great Northern Railway Company for the guaranty period, as credits, items amounting to $121,932.80 which should have been credited in the accounts of the director general, and that the allowance by the carrier of this amount in its settlement with the director general would necessarily reduce the net railway operating income for the guaranty period to the same extent, thereby increasing the amount due the carrier under section 209. It is alleged that these items were erroneously charged against the carrier in our ascertainment and certificate of June 17, 1925.

The protection of the Government, as well as the necessity of avoiding discrimination in the treatment of carriers,
237 required that the determination of railway operating income be governed by the uniform accounting rules prescribed by us. Therefore, as soon as practicable after the passage of the transportation act, field examinations were undertaken to test and to correct the accounting of each carrier subject to the section, and these examinations have proceeded as rapidly as possible with the force at our disposal. Similar examinations were undertaken by the Director General of Railroads in connection with his settlement with the carriers for the period of Federal control. The items above referred to were reported as a result of the director general's examination. Our own review of the accounts, however, has shown that the amount due the Great Northern Railway Company under section 209 in respect of such items should be increased by $98,444.48, and the certificate of June 17, 1925, will be amended accordingly. It is understood that this correction is satisfactory to the carrier.

VII

The carrier denies the authority of the commission to question the correctness of its certificate of March 1, 1921, in the amount of $6,000,000 issued under section 212 of the transpor-

tation act, which authorizes the certification of only such amounts as are definitely ascertained to be due. This contention of the carrier, in our opinion, is based upon a misconception of the purpose of the certificates provided for by sections 209 and 212. The pertinent portion of section 209 reads as follows:

The Commission shall, as soon as practicable after the expiration of the guaranty period, ascertain and certify to the Secretary of the Treasury the several amounts necessary to make good the foregoing guaranty to each carrier. The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States, for the amount shown in such certificate as necessary to make good such guaranty.

Section 212 contains the following provision:

In making certifications under section 204 or section 209, the Commission, if not at the time able finally to determine the whole amount due under such section to a carrier or the American Railway Express Company, may make its certificate for any amount definitely ascertained by it to be due and may thereafter in the same manner make further certificates, until the whole amount due has been certified. The authority of and direction to the Secretary of the Treasury under such sections to draw warrants is hereby made applicable to each such certificate * * *.

It is noted that the certificates thus provided for are issued to the Secretary of the Treasury and not to the carrier to be benefited. It seems clear that their purpose is to protect the Treasury Department in its disbursement of funds of the Government and there is no indication of any intent on the part of Congress to vest the carriers with any rights
238 under the certificates distinct from their rights under the sections as a whole. The circumstances under which the certificates covering partial payments under section 212 were issued have been described. Notwithstanding the fact that section 212 contemplated a definite ascertainment of amounts due, the statute must be read in the light of the circumstances surrounding its administration. Insistence upon absolute insurance against overpayment would have defeated the purpose of the law. If we have construed the statute too liberally, the carriers have received the benefit.

With the exception indicated, the findings of the report of June 17, 1925, are affirmed.

Amended Certificate No. A-1041 under Section 209 (g) of the Transportation Act, 1920 (Cancels Certificate No. A-1041 Dated June 17, 1925) (This certificate also embraces Finance Dockets Nos. 463 and 879.)

To the Secretary of the Treasury of the United States:

1. The Interstate Commerce Commission, hereinafter called the commission, hereby certifies that the Great Northern Railway Company, a corporation of the State of Minnesota, the Farmers' Grain & Shipping Company, a corporation of the State of North Dakota, and the Watertown & Sioux Falls Railway Company, a corporation of the State of South Dakota, hereinafter called the carriers, are carriers as defined in subdivision (a) of section 209 of the transportation act, 1920, and that the carriers filed with the commission on or before March 15, 1920, written statements that they accepted all of the provisions of said section 209 and that the two companies last mentioned individually filed with the commission resolutions passed by their respective boards of directors authorizing the Great Northern Railway Company to act as their agent in effecting settlement under said section 209 and to receive payment of any sum or sums due them thereunder, said companies being under common control through direct or indirect ownership of their capital stock and composing a single system of transportation.

2. The commission has ascertained, and hereby certifies to the Secretary of the Treasury, that the amount necessary to make good to said Great Northern Railway Company the guaranty provided by section 209 of the transportation act, 1920, is $11,170,214.02; that the amount necessary to make good said guaranty to said Farmers' Grain & Shipping Company is $31,418.88; and that the amount necessary to make good said guaranty to the said Watertown & Sioux Falls Railway Company is $75,698.89.

239 3. The commission has heretofore certified to the Secretary of the Treasury as advances under section 209 (h) to said Great Northern Railway Company an aggregate amount of $6,500,000, as follows:

Certificate No. 65, June 25, 1920	$3,000,000
Certificate No. 225, August 31, 1920	2,000,000
Certificate No. 276, November 4, 1920	1,500,000

and as partial payment to said Great Northern Railway Company under section 209(g), as amended by section 212, an amount of $6,000,000 on March 1, 1921, under certificate No. A-329.

4. The commission has made final determination as aforesaid of the amount of the guaranty provided for by section 209 of the transportation act, 1920.

Dated this 8th day of June, 1926.

By the commission.

GEORGE B. McGINTY,
Secretary.

Credits	Filed June 14, 1920 Mch. and Apr. Entered May, June, July, Aug. Estimated		Filed August 23, 1920 Mch., Apr., May, June Entered July, August Estimated			Filed Feb. 14, 1921 Completed Entries		Filed July 15, 1922 Final Return	
Railway operating revenues	57177729		59434115			57851159		58097306	
Equipt. rents receivable (net)	746332		1785335			1915410		1922609	
Joint facility rents—Cr.									
Total Credits		57924061		61219450			59766569		60019915
Debits									
					Actual				
Maintenance of Way and Structures	10343190		13783519		15797573	13939490		15907417	
Maintenance of Equipment	11514124		11953675		13094027	15916093		13523026	
Total Maintenance	21857314		25737194		28891600	29855583		29430443	
Traffic	779086		729488			669996		673503	
Transportation	21302913		24174888			25961412		25703510	
Miscellaneous	811285		925379			1014364		1014423	
General	1177139		1469203			1506094		1506379	
Transportation for Investment—Cr.	82889		114105			125661		145920	
Total Oper. Expenses	45844849		52922046			58881788		58182336	
Railway Tax Accruals	4336992		4228298			4358678		4260816	
Uncollectible revenues	8745		8346			3716		18272	
Equipment rents—Dr.	11000								
Joint facility rents—Dr.	154552		124175			178221		205367	
Total Debits		50356137		57282863			63422403		62666791
Railway Operating Income		7567924		3936588			3655834		2646876

241

(Gov't. Exhibit 9

Great Northern R

Section 209-212

Basis of Claim:	Estimated amount necessary to make good the guaranty for partial payment purposes (1)			
Income for average six months of test period			14333341	
Amount claimed under section 4, Federal Control Act.			509217	
Net railway operating deficit for guaranty period			3655834	
Special claim for maintenance				
Total amount claimed by carrier				18498392
Adjustments:				
Amt. claimed under section 4, Federal Control Act		509217		
Allowance based on 4% of road and 6% of equipment		365789		
Deduction			143428	
Deductions to cover accounting errors unsettled			26945	
Maintenance of way, claimed	13939490			
Do allowed	13267947			
Deduction		671543		
Maintenance of equipment claimed	15916093			
Do allowed	13965305			
Deduction		1950788		
Total maintenance deduction			2622331	
Total mtce. claimed	29855583			
" " allowed	27233252			
Total deductions				27927041
Estimated amount necessary to make good guaranty				15705688

Net. Ry. op. i
Do

Special clain

Total mtce. c
" " a
" claim. i
28

Deductions a
212 b.

242

(1) Recommended by Bureau of Finance to Commission 2/19/21—Approved by as advances under par. h—This ctf. not honored by Treasury Dept.—Same payment under 212. This ctf. was intended for credit purposes only.

				a—against f—favor
	Itemization from report in final settlement		Difference	
	14306522.65		26818	a
	631599.48		122383	f
Income	884323.64		4540158	a
	2334052.12		2334052	f
		Net	2206101	a
		16387850.61	2110546	a
	631599.48			
	474411.95		108623	
	157187.53			
claimed 88432364	1153002.07	in 1119cc337		
Adjusted 125144655	367122.91	268678.43		
for maintenance	2334052.12			
imed 25899242.40	(Dif. in amt. claimed)			
owed 23815780.74	(for mtce.)		3417471	
. spl.	(1622288 a)			
3294.52				
	2083461.66			
estimates under	374256.85			
		5316081.07		
		11071769.54		
		11170214.02		
	Paid	12500000		
	Due U. S.	1329785.98		

Div. 4 2/21/21—Certified to Treasury Dept. 2/23/21—Above
ain certified to Treasury Dept. on Mch. 1, 1921 as a partial

243 (Defendant's Exhibit B.)

Finance Docket No. 501

Bureau of Finance

February 21, 1921.

Subject: Partial payment for credit purposes to Great Northern Railway Company under section 209 (g).

Memorandum to Commissioner Meyer:

I am transmitting herewith, with recommendation for approval by Division 4, the required number of copies of report, proposed certificate and letter to the Secretary of the Treasury for a partial payment to the Great Northern Railway Company under section 209 (g) of the Transportation Act, 1920, to be used for credit purposes.

(Signed) W. A. COLSTON,
Director.

Enclosures.

244 Report of Bureau of Finance

In Re Application for a Partial Payment Under Section 209 (g).

For Credit Purposes Only.

Name of Carrier: Great Northern Railway Company. Finance Docket No. 501.

Date of filing: February 18, 1921.

Date filed acceptance of provisions of Transportation Act, 1920, March 5, 1920

Under [Feceral] control during Federal control period: January 1, 1918, to February 29, 1920, both inclusive.

Amount applied for: $6,000,000.

When required: Immediately.

Necessity for partial payment:

To pay taxes and meet other pressing obligations.

Basis of Claim:

Net railway operating deficit for guaranty period as reported in schedule C, column (j)		$ 3,655,834
One-half of the amount named in contract fixing the amount of just compensation under the Federal Control Act	$14,333,341	
Plus one-half the amount of annual increase in such just compensation as provided for in section 4 of the Federal Control Act	509,217	
Total amount reported under schedule E, section I		14,842,558
Total amount claimed		$18,498,392

Amount necessary to make good guaranty:

Based upon returns for six months of guaranty period, as adjusted for partial payment purposes	15,705,688

Gross amount previously certified for payment to applicant:

As advances under section 209 (h)	6,500,000
As partial payment under section 209(g)	.....

Balance due applicant:	9,205,688

Recommendation:

That $6,000,000 be certified as partial payment.

245 Remarks:

The applicant has filed its claim for final settlement under section 209 of the Transportation Act, 1920, and at the same time is making an urgent appeal for a partial payment of $6,000,000, to be used for credit purposes only, to provide for the payment of taxes and meet other pressing obligations. We have examined the data submitted by the applicant and estimate that the Government would have to pay not less than $15,705,688 to make good the guaranty, of which $6,500,000 has already been advanced. In arriving at this result we have made the following adjustments:

Income for six months of test period	$14,333,341
Claimed under section 4, Federal Control Act	509,217
Net railway operating deficit for guaranty period (Schedule C adjusted)	3,655,834
Total claimed by carrier	$18,498,392

Adjustments:

Claimed under section 4	$ 509,217	
Allowance on basis of 4% on road and 6% on equipment	365,789	
Deduction		$ 143,428
Deductions to cover accounting errors unsettled		26,945
Maintenance of Way, claimed	13,939,490	
Maintenance of Way, allowed	13,267,947	
Deduction		671,543
Maintenance of Equipment, claimed	15,916,093	
Maintenance of Equipment, allowed	13,965,305	
Deduction		1,950,788
Total Deductions		$ 2,792,704
Estimated amount necessary to make good the guaranty		15,705,688
Advances certified		6,500,000
Balance estimated to be due carrier		$ 9,205,688

246 The amount of the carrier's claim ($18,498,392) has been reduced for the purpose of this estimate to the extent of $2,792,704 through adjustments as follows:

A deduction of $26,945 on account of unsettled items in correspondence between the Bureau of Carriers Accounts and the carrier.

A deduction of $143,428 in the amount claimed under section 4 of the Federal Control Act to bring the carrier's claim within the general policy established by the Railroad Administration of allowing 4% on road and 6% on equipment put in operation during the Federal control period.

A deduction of $671,543 from the amount claimed on account of maintenance of way and structures, to eliminate all factors except the increased cost of material, increased wages of labor, increased property and increased usage.

A deduction of $1,950,788 from the amount claimed on account of maintenance of equipment to put this expense on a basis similar to that maintained in the preceding paragraph.

It is found that the carrier's actual aggregate expenditure for maintenance during the guaranty period is in excess of the amount fixed as an allowance for the purpose of this estimate. Depreciation, retirements and insurance were handled separately, the allowance for the first two items being based on a ratio to property investment similar to that obtaining in the test period, while the actual expenditure for insurance was allowed the sum being comparable with the test period charge.

247 As the total of transportation expenses and other general accounts indicate a ratio to the test period somewhat under that established for maintenance, it is not felt necessary, in this estimate, to make any deduction on account of possible disproportionate or unreasonable items. This is especially true in view of the margin of safety that will remain after the certification of the amount recommended. Upon the showing above indicated, a partial payment for credit purposes only of $6,000,000 is recommended to enable the carrier, as requested, to pay its taxes due on or before March 1, and meet other pressing obligations.

Recommendation approved:

(Signed) W. A. COLSTON

Director

(Signed) G. J. BUNTING

Assistant to Director.

February 19, 1921.

248 (Defendant's Ex. C)

Finance Docket No. 501.

Bureau of Finance

February 28, 1921.

Subject: Partial payment to Great Northern Railway Company under section 209 (g), as amended, and cancellation of certificate No. A-328.

Memorandum to Commissioner Meyer:

I am transmitting herewith, with recommendation for approval by Division 4, the required number of copies of report, proposed certificate to the Secretary of the Treasury cancelling certificate No. A-328 and proposed certificate to the Secretary of the Treasury for a partial payment to the Great Northern Railway Company under section 209 (g) of the Transportation Act, 1920, as amended.

(Signed) W. A. COLSTON
Director.

Enclosures.

249 Report of Bureau of Finance

In Re Application for Partial Payment Under Section 209 of the Transportation Act, 1920, as Amended by Section 212.

Finance Docket No. 501.

Name of Carrier: Great Northern Railway Company

Date of filing: February 18, 1921.

Date filed acceptance of provisions of Transportation Act, 1920: March 5, 1920

Under Federal control during Federal control period: January 1, 1918, to February 29, 1920, both inclusive.

Amount applied for: $6,000,000.

When required: Immediately.

Necessity for partial payment: To pay taxes and meet other pressing obligations.

Basis of Claim:

Net railway operating deficit for guaranty period as reported in schedule C, column (j)		$ 3,655,834
One-half of the amount named in contract fixing the amount of just compensation under the Federal Control Act	$14,333,341	
Plus one-half the amount of annual increase in such just compensation as provided for in section 4 of the Federal Control Act	509,217	
Total amount reported under schedule E, section I		$14,842,558
Total amount claimed		$18,498,392
Amount necessary to make good guaranty: Based upon returns for six months of guaranty period, as adjusted for partial payment purposes		15,705,688
Gross amount previously certified for payment to applicant:		
As advances under section 209 (h)		6,500,000
As partial payment under section 209 (g)..#		6,000,000
Balance due applicant:		$ 9,205,688

Recommendation:

#That $6,000,000 be certified as partial payment under section 212 and certificate No. A-328 issued as partial payment under section 209 (g), for credit purposes only, be cancelled.

250 Remarks:

The applicant has filed its claim for final settlement under section 209 of the Transportation Act, 1920, and at the same time is making an urgent appeal for a partial payment of $6,000,000, to be substituted for certificate No. A-328 issued for credit purposes only, to provide for the payment of taxes and to meet other pressing obligations. We have examined the data submitted by the applicant and find that the Government would have to pay not less than $15,705,688 to make good the guaranty, of which $6,500,000 has already

been advanced. In arriving at this result we have made the following adjustments:

Income for six months of test period			$14,333,341
Claimed under section 4, Federal Control Act			509,217
Net railway operating deficit for guaranty period (schedule C adjusted)			3,655,834
Total claimed by carrier			$18,498,392
Adjustments:			
Claimed under section 4	$ 509,217		
Allowance on basis of 4% on road and 6% on equipment	365,789		
Deduction		$ 143,428	
Deductions to cover accounting errors unsettled		26,945	
Maintenance of Way, claimed	$13,939,490		
Maintenance of Way, allowed	13,267,947		
Deduction		671,543	
Maintenance of Equipment, claimed	$15,916,093		
Maintenance of Equipment, allowed	13,965,305		
Deduction		1,950,788	
Total deductions			$ 2,792,704
Amount necessary to make good the guaranty			$15,705,688
Advances certified			6,500,000
Balance ascertained to be due carrier			$ 9,205,688

251 The amount of the carrier's claim ($18,498,392) has been reduced for the purpose of this payment to the extent of $2,792,704 through adjustments as follows:

A deduction of $26,945 on account of unsettled items in correspondence between the Bureau of Accounts and the carrier.

A deduction of $143,428 in the amount claimed under section 4 of the Federal Control Act to bring the carrier's claim within the general policy established by the Railroad Administration of allowing 4% on road and 6% on equipment put in operation during the Federal control period.

A deduction of $671,543 from the amount claimed on account of maintenance of way and structures, to eliminate all factors except the increased cost of material, increased wages of labor, increased property and increased usage.

A deduction of $1,950,788 from the amount claimed on account of maintenance of equipment to put this expense on a basis similar to that maintained in the preceding paragraph.

It is found that the carrier's actual aggregate expenditure for maintenance during the guaranty period is in excess of the amount fixed as an allowance for the purpose of this ascertainment. Depreciation, retirements and insurance were handled separately, the allowance for the first two items being based on a ratio to property investment similar to that obtaining in the test period, while the actual expenditure for insurance was allowed, the sum being comparable with the test period charge.

As the total of transportation expenses and other general accounts indicate a ratio to the test period somewhat
252 under that established for maintenance, it is not felt necessary, in this ascertainment, to make any deduction on account of possible disproportionate or unreasonable items. This is especially true in view of the margin of safety that will remain after the certification of the amount recommended.

Upon the showing above indicated, a partial payment of $6,000,000 is recommended to be issued in lieu of certificate No. A-328, issued as a partial payment for credit purposes only under section 209 (g), which latter certificate we recommend be cancelled.

Recommendation approved:

(signed) W. A. COLSTON
Director.

(Signed) G. J. BUNTING
Assistant to Director.

February 28, 1921.

253 (Defendant's Exhibit D.)

Bureau of Finance

WAC-B
March 2, 1921.

Subject: Tentative rules for partial payments under section 209(g) of the Transportation Act, as amended by section 212.

Memorandum to Mr. Bunting:

#Pending definite action by the Commission please observe the following tentative rules in recommending for certification partial payments under section 209 (g) of the Transportation Act, as amended.

(1) Partial payments will be made upon request by letter provided returns to the Commission's orders of October 18, 1920, and January 5, 1921 have been received. Partial payments are not based upon estimates as were advances under section 209 (h), but represent definite ascertainments. For such definite ascertainments the returns under the Commission's orders are necessary. This rule has been approved by Division 4 but is, of course, subject to exception in cases of urgent necessity where the exception is approved by the Commission. If the carriers are desirous of partial payments they should do their part and get in their returns. They cannot reasonably expect the Commission to help them if they will not help themselves.

(2) Partial payments, being based upon definite determinations and not upon estimates, must be based upon the same character of adjustments as final payments are based upon, and therefore, our report should not indicate adjustments for partial payments purposes upon a different basis than that finally used. In line with this it may be pointed out that an estimate of even the most conservative sort, for example, one of 200% of test period material and labor costs, nevertheless is an estimate. The carrier should furnish us with information upon which to make a definite determination, and having definitely determined the adjustment for price of labor and material we can make a settlement upon that basis, leaving items other than price open for further adjustment. Our partial settlement, of course, need not be for the full amount definitely ascertained.

(3) Applications will be acted upon in the order of their receipt if supported by the returns to the Commission's cir-

#Approved by Division 4,
March 3, 1921.

cular. Again the Commission reserves the right to vary this in cases of emergency, but the general rule as stated has been approved by Division 4.

(4) Until otherwise advised increased allowances for maintenance will be limited to increased cost of material and increased payroll prices of labor, with such adjustments as may be necessary and proper for additional property and use.

W. A. COLSTON,
Director.

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254 (Stipulation Approving Bill of Exceptions.)

United States District Court, District of Minnesota, Third Division.

United States of America,
Plaintiff,
vs.
Great Northern Railway Company,
Defendant.
No. 2246.
At Law.

It is hereby stipulated and agreed that the foregoing transcript consisting of 176 [typewirtten] printed and photostatic pages, including plaintiff's exhibits 1, 2, 6, 7, 8 and 9, and defendant's exhibits B, C, and D, may be accepted, assigned, settled and allowed as the Bill of Exceptions, or settled case in the above entitled matter, and that the same includes all the evidence offered and received at the trial, and shows all the proceedings, objections, rulings and exceptions made, taken and rendered on the trial of said cause, and that the same may be settled by the Court as the Bill of Exceptions and case.

LEWIS L. DRILL
United States Attorney for the District of Minnesota, and Attorney for [Palintiff].

ELMER B. COLLINS and
WENDELL BERGE
Special Assistants to the Attorney General of the United States, and Attorneys for Plaintiff.

F. G. DORETY
R. J. HAGMAN
J. H. MULALLY
Attorneys for Defendant.

(Order Approving Bill of Exceptions.)

Upon the foregoing stipulation, the foregoing transcript consisting of 176 typewritten, printed and photostatic pages, including plaintiff's exhibits 1, 2, 6, 7, 8 and 9 and defendant's exhibits B, C & D, is hereby settled and allowed as a full, true and complete transcript of all the evidence introduced at the trial of the above entitled cause,
255 and includes all the objections, rulings, exceptions and proceedings had and taken in the trial of said cause, and the same is hereby duly allowed as the Bill of Exceptions and settled case.

Dated St. Paul, Minnesota, this 21 day of October, 1931.

JOHN B. SANBORN,
Judge of the United States District Court for the District of Minnesota.

Indorsed: Bill of Exceptions, Stipulation and Order Allowing Bill of Exceptions. Filed October 21, 1931. Joel M. Dickey, Clerk. By Margaret L. Mullane, Chief Deputy.

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256 Citation on Appeal

In the District Court of the United States
For the District of Minnesota

United States of America, Plaintiff, v. Great Northern Railway Company, Defendant.	At Law No. 2246

United States of America, ss:

To the

Great Northern Railway Company and to its Attorney, F. G. Dorety, Esquire, St. Paul, Minnesota, Defendant, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis in the State of Missouri, forty days from and after the date of this citation, pursu-

ant to an appeal taken and filed in the office of the Clerk of the United States District Court for the District of Minnesota, notice of said appeal having been served upon you in the above-entitled cause, wherein United States of America is appellant and you are the appellee, to show cause, if any there be, why the judgment rendered against said appellant in said cause should not be reversed, and why speedy justice should not be done to said appellant in that behalf.

Dated, St. Paul, Minnesota, this 25th day of September, 1931.

JOHN B. SANBORN
Judge, United States District Court
For the District of Minnesota

Due service of the foregoing citation by copy thereof is hereby admitted at St. Paul, Minnesota, this 25th day of September, 1931.

F. G. DORETY
Attorney for the Defendant

Endorsed: Filed in U. S. District Court on Sept. 25, 1931.

257

258 (Election as to printing of Record.)

To the Clerk of the United States District Court for the District of Minnesota:

In pursuance of the praecipe therefor filed in the above entitled cause, you are hereby respectfully requested to prepare the transcript in typewritten form on the appeal by the above named United States of America, plaintiff, taken from the judgment entered on the 26th day of June, 1931, in said cause, in order that said transcript may be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, Missouri.

And said plaintiff, United States of America, hereby elects to have the record in said cause on appeal as aforesaid printed under the supervision of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Dated this 21st day of October A. D. 1931.

LEWIS L. DRILL
United States Attorney and attorney for Plaintiff.

ELMER B. COLLINS, and
WENDELL BERGE
Special Assistants to the Attorney General for the United States, and Attorneys for plaintiff.

Indorsed: Election as to printing. Filed October 21, 1931. Joel M. Dickey, Clerk. By Kathryn F. O'Connor, Deputy.

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259 (Praecipe for Transcript.)

It is hereby stipulated and agreed by and between the undersigned respective counsel for the above named parties, plaintiff and defendant, that the Clerk of the United States District Court for the District of Minnesota, be and is hereby directed to prepare and certify a transcript of the record in the above entitled case for the use of, and to make a return to, the Circuit Court of Appeals for the Eighth Circuit by including therein the following:

1. Complaint
2. Demurrer
3. Opinion Sustaining Demurrer
4. Orders Extending Time for Filing Amended Complaint
5. Amended Complaint
6. Answer.
7. Opinion of District Court and Judgment thereon June 26, 1931.
8. Bill of Exceptions or settled case together with Stipulation and Order allowing same and exhibits.
9. Notice of appeal
10. Assignments of Error.
11. Petition for Appeal
12. Order Allowing Appeal
13. Citation on Appeal.
14. Any orders hereafter made enlarging Citation.
15. Election to file transcript to be printed under supervision of the Clerk.

16. Appearance of counsel.

17. This praecipe for transcript together with the admissions of dates of service endorsed on above mentioned papers by attorneys for above named defendant.

260

LEWIS L. DRILL
United States Attorney for the District of Minnesota and attorney for plaintiff.

ELMER B. COLLINS and
WENDELL BERGE
Special Assistants to the Attorney General of the United States, and Attorneys for plaintiff.

F. G. DORETY
R. J. HAGMAN
J. H. MULALLY
Attorneys for Defendant.

Dated at St. Paul, Minnesota, this 21st day of October, A. D. 1931.

Indorsed: Praecipe Filed October 21, 1931. Joel M. Dickey, Clerk. By Kathryn F. O'Connor, Deputy.

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261 (Clerk's Certificate to Transcript.)

United States District Court, District of Minnesota, Third Division.

United States of America,
Plaintiff,
vs.
Great Northern Railway Company,
Defendant.
} No. 2246. At Law.

United States of America, District Court of the United States, District of Minnesota, Third Division.

I, Joel M. Dickey, Clerk of said District Court, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Eighth Circuit, that the foregoing, consisting of 261 pages, numbered consecutively from 1 to 261, inclusive, is a true and complete transcript of the record and proceedings in said cause, wherein United States

of America is plaintiff, and Great Northern Railway Company, a corporation, is defendant, and of the whole thereof (except as modified by the praecipe of said parties to be found at page 259 of said transcript) as appears from the original records and files of said Court; and I do hereby further certify and return that I have annexed to said transcript and included within said paging the original Citation, together with proof of service thereof.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at St. Paul, in the District of Minnesota this 23rd day of October A. D. 1931.

JOEL M. DICKEY,
Clerk.

By MARGARET L. MULLANE,
Chief Deputy.

(U. S. Dist. Court Seal)

Filed Oct 26 1931 E. E. Koch Clerk.

225 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

(Appearance of counsel for appellant)

United States Circuit Court of Appeals, Eighth Circuit

No. 9334

UNITED STATES OF AMERICA, APPELLANT

vs.

GREAT NORTHERN RAILWAY COMPANY

The clerk will enter my appearance as Counsel for the Appellant.

LEWIS L. DRILL,
United States Attorney,
P. O. Building, St. Paul, Minnesota.
ELMER B. COLLINS,
Special Assistant to the Attorney General.
GEO. A. HEISEY,
Asst. U. S. Attorney (Minnesota).

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 6, 1931.

226 (Appearance of counsel for appellee)

The clerk will enter my appearance as counsel for the appellee.

F. G. DORETY,
R. J. HAGMAN,
J. H. MULALLY,
1120 Great Northern Bldg., St. Paul, Minn.

(Endorsed); Filed in U. S. Circuit Court of Appeals, Nov. 2, 1931.

Order of submission

November term, 1931

THURSDAY, DECEMBER 3, 1931.

This cause having been called for hearing in its regular order, the ame was argued by Mr. Elmer B. Collins, special assistant to Attorey General, for appellant and by Mr. F. G. Dorety for appellee. Thereupon, this cause was submitted to the court on the transcript f the record from said District Court and the briefs of counsel filed erein, with leave to counsel for appellant to file a reply brief on or efore December 12, 1931.

United States Circuit Court of Appeals, Eighth Circuit

No. 9334.—March Term, A. D. 1932

United States of America, appellant *vs.* Great Northern Railway Company, appellee	Appeal from the District Court of the United States for the District of Minnesota

Mr. Elmer B. Collins, special assistant to Attorney General (Mr. Lewis L. Drill, United States attorney, and Mr. John Lord O'Brian, assistant to Attorney General, were on the brief), for appellant.

Mr. F. G. Dorety (Mr. R. E. L. Smith and Mr. J. Hagman on the brief), for appellee.

Before Kenyon, Van Valkenburgh, and Gardner, Circuit Judges

Van Valkenburgh, Circuit Judge, delivered the opinion of the court.

The Great Northern Railway Company, a corporation of the State of Minnesota, is a carrier as defined in section 209 of the transportation act of 1920, in that it is a carrier whose railroad, or system of transportation, was under Federal control at the time such control terminated at 12.01 a. m. on March 1, 1920. Said section 209 fixed the six months' period, beginning March 1, 1920, as a so-called guaranty period during which the railway operating income
228 of a common carrier, with which the Director General of Railroads had made a contract fixing the amount of just compensation to such carrier under the Federal control act (40 Stat. 451), should not be less than one-half the amount named in such contract as the annual compensation of such carrier for the period of Federal control. Under this provision the guaranteed income of appellee for the six months' guaranty period was $14,306,522.65. Paragraphs (g) and (h) of said section 209 provide thus:

"(g) The commission shall, as soon as practicable after the expiration of the guaranty period, ascertain and certify to the Secretary of the Treasury the several amounts necessary to make good the foregoing guaranty to each carrier. The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States, for the amount shown in such certificate as necessary to make good such guaranty.

"(h) Upon application of any carrier to the commission, asking that during the guaranty period there may be advanced to it from time to time, such sums, not in excess of the estimated amount necessary to make good the guaranty, as are necessary to enable it to meet its fixed charges and operating expenses, the commission may certify to the Secretary of the Treasury the amount of, and times at which, such advances, if any, shall be made. The Secretary of the

Treasury, on receipt of such certificate, is authorized and directed to make the advances in the amounts and at the times specified in the certificate, upon the execution by the carrier of a contract, secured in such manner as the Secretary may determine, that upon final determination of the amount of the guaranty provided for by this section such carrier will repay to the United States any amounts which it has received from such advances in excess of the guaranty, with interest at the rate of 6 per centum per annum from the time such excess was paid."

Under the permission granted by paragraph (h) appellee applied for and received advances aggregating $6,500,000. The certificates of the commission authorizing these payments were issued "under section 209 (h) transportation act, 1920," on June 26, 1920; August 31, 1920; and November 4, 1920, respectively. Section 209
229 had been construed to authorize advances of this nature only upon applications filed before the guaranty period expired August 31, 1920. February 14, 1921, appellee, being in urgent need of financial assistance to meet its current obligations, made application for a further payment of $6,000,000. Realizing that, because its application was made out of time, it could not cash a certificate issued upon that application, it stated that it desired this certificate for credit purposes only, and as collateral for a loan. Accordingly the commission, after examining an exhaustive return made by the carrier, filed February 14, 1921, issued, on February 23, 1921, the following certificate numbered A–328:

"Certificate of Interstate Commerce Commission under section 209 (g), transportation act, 1920

"To the Secretary of the Treasury of the United States:

"1. The Interstate Commerce Commission, hereinafter called the commission, hereby certifies that the Great Northern Railway Company, a corporation of the State of Minnesota, hereinafter called the carrier, is a carrier as defined in paragraph (a) of section 209 of the transportation act, 1920, in that it is a carrier by railroad whose railroad system of transportation was under Federal control at the time such Federal control terminated at 12.01 a. m. March 1, 1920; that the carrier filed with the commission on or before March 15, 1920, a written statement that it accepted all of the provisions of the said section 209.

"2. The commission has ascertained and hereby certifies to the Secretary of the Treasury that the amount of six million dollars ($6,000,000) in addition to any other sum or sums heretofore certified in favor of the carrier under section 209 of the transportation act, 1920, is necessary to make good to said carrier the guaranty provided by the said section.

3. The commission hereby certifies that such amount of six million dollars ($6,000,000) can not be reduced by further accounting or otherwise, and there may be, upon further investigation, additional

United States Circuit Court of Appeals, Eighth Circuit

No. 9334.—March Term, A. D. 1932

United States of America, appellant *vs.* Great Northern Railway Company, appellee	Appeal from the District Court of the United States for the District of Minnesota

Mr. Elmer B. Collins, special assistant to Attorney General (Mr. Lewis L. Drill, United States attorney, and Mr. John Lord O'Brian, assistant to Attorney General, were on the brief), for appellant.

Mr. F. G. Dorety (Mr. R. E. L. Smith and Mr. J. Hagman on the brief), for appellee.

Before Kenyon, Van Valkenburgh, and Gardner, Circuit Judges

Van Valkenburgh, Circuit Judge, delivered the opinion of the court.

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"(h) Upon application of any carrier to the commission, asking that during the guaranty period there may be advanced to it from time to time, such sums, not in excess of the estimated amount necessary to make good the guaranty, as are necessary to enable it to meet its fixed charges and operating expenses, the commission may certify to the Secretary of the Treasury the amount of, and times at which, such advances, if any, shall be made. The Secretary of the

Treasury, on receipt of such certificate, is authorized and directed to make the advances in the amounts and at the times specified in the certificate, upon the execution by the carrier of a contract, secured in such manner as the Secretary may determine, that upon final determination of the amount of the guaranty provided for by this section such carrier will repay to the United States any amounts which it has received from such advances in excess of the guaranty, with interest at the rate of 6 per centum per annum from the time such excess was paid."

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"Certificate of Interstate Commerce Commission under section 209 (g), transportation act, 1920

"To the SECRETARY OF THE TREASURY OF THE UNITED STATES:

"1. The Interstate Commerce Commission, hereinafter called the commission, hereby certifies that the Great Northern Railway Company, a corporation of the State of Minnesota, hereinafter called the carrier, is a carrier as defined in paragraph (a) of section 209 of the transportation act, 1920, in that it is a carrier by railroad whose railroad system of transportation was under Federal control at the time such Federal control terminated at 12.01 a. m. March 1, 1920; that the carrier filed with the commission on or before March 15, 1920, a written statement that it accepted all of the provisions of the said section 209.

"2. The commission has ascertained and hereby certifies to the Secretary of the Treasury that the amount of six million dollars ($6,000,000) in addition to any other sum or sums heretofore certified in favor of the carrier under section 209 of the transportation act, 1920, is necessary to make good to said carrier the guaranty provided by the said section.

3. The commission hereby certifies that such amount of six million dollars ($6,000,000) can not be reduced by further accounting or otherwise, and there may be, upon further investigation, additional

amounts found due to said Great Northern Railway Company to make good to said carrier the guaranty of section 209 of the transportation act, 1920, and which if, and when, ascertained by the commission will be certified to the Secretary of the Treasury."

230 The return made by appellee, February 14, 1921, as aforesaid, was a very elaborate one, and was made in response to an order of the commission of October 18, 1920, requiring the carriers to file with the commission "true and correct returns to the questionnaire or form of statement which accompanies this order and is made a part hereof." This form of statement was thus described:

"Outline of form for use by carriers in presenting claim or statement as a basis for settlement under section 209 of the transportation act, 1920."

The outline covers twenty-two printed pages of the record and calls for an exhaustive return, under oath, of every conceivable railway operative element essential to a basis for final settlement between Government and carrier under the provisions of the transportation act. The purpose in mind when the order of October 18, 1920, was issued is thus expressed in its opening clause:

"Whereas, under the provisions of section 209 (g) of the transportation act, 1920, this commission is charged with the duty of ascertaining and certifying to the Secretary of the Treasury as soon as practicable after the expiration of the guaranty period the several amounts necessary to make good the guaranty to each carrier to which said section is applicable."

The return was demanded on or before January 1, 1921; but that of appellee was not completed until February 14th. It contained one hundred and nineteen pages of tables and statistical matter. Meantime it was realized that a considerable period of time must elapse before computations for final settlements could be made with the many carriers whose systems of transportation had been placed under Federal control, and that, turning back the railroads with an increase of expenditures much greater, in proportion, than the increase of revenues, might, and probably would, lead to failures and receiverships, unless the provision of section 209 for advancements pending final settlement should be extended beyond the guaranty period fixed by that section. Accordingly a bill, known as the Winslow bill, was before Congress in an advanced state when the certificate of February 23, 1921, was issued to appellee. Three days later (February 26, 1921) it became a law as section 212 of the

231 transportation act (41 Stat. L. 1145). It contains the following provisions most pertinent to this inquiry:

"(a) In making certifications under section 204 or section 209, the commission, if not at the time able finally to determine the whole amount due under such section to a carrier or the American Railway Express Company, may make its certificate for any amount definitely ascertained by it to be due, and may thereafter in the same manner make further certificates, until the whole amount due has been certified. The authority of and direction to the Secretary of the Treasury

under such sections to draw warrants is hereby made applicable to each such certificate. * * *.

"(b) In ascertaining the several amounts payable under either of such sections, the commission is authorized, in the case of deferred debits and credits which can not at the time be definitely determined, to make, whenever in its judgment practicable, a reasonable estimate of the net effect of any such items, and, when agreed to by the carrier or express company, to use such estimate as a definitely ascertained amount in certifying amounts payable under either of such sections, and such estimates so agreed to shall be prima facie but not conclusive evidence of their correctness in amount in final settlement."

Thereupon appellee made application for a new certificate of indebtedness under the provisions of section 209 as thus amended. February 28, 1921, the bureau of finance of the Interstate Commerce Commission made its report upon this application. It said:

"The applicant has filed its claim for final settlement under section 209 of the transportation act, 1920, and at the same time is making an urgent appeal for a partial payment of $6,000,000, to be substituted for certificate No. A–328 issued for credit purposes only, to provide for the payment of taxes and to meet other pressing obligations. We have examined the data submitted by the applicant and find that the Government would have to pay not less than $15,705,688 to make good the guaranty, of which $6,500,000 had already been advanced."

This report is made under the following heading:

"In re application for partial payment under section 209 of the transportation act, 1920, as amended by section 212"

232 The bureau of finance made various adjustments in accordance with the information before it, and the factors and formulae then recognized and employed in transactions of this nature between appellant and other carriers. This work of the bureau appears to have been very thorough, as revealed by the testimony of the Government's witness:

"There were several representatives of the bureau both of the accounting and engineering sections engaged in conferences with different representatives of the defendant during the working or week days between February 14th and 23rd, approximately 8 or 9 days;" and further:

"Wherever the defendant had followed a method or principle which the commission considered questionable, it made a deduction to cover it."

It is conceded that the commission, through its bureau, made a thorough mathematical check of the figures in appellee's returns. It will be remembered that those returns were made upon a form and in the manner prescribed by the commission in its order of October 18, 1920. The result of the adjustments made by the bureau of finance was to reduce the total amount claimed by appellee—$18,498,392, to $15,705,688. The amount of the reduction—$2,792,704—included all

items obviously subject to disapproval and disapproved, together with all items which the bureau considered questionable because not yet definitely considered and determined. This reduction, as stated by the report, was made " for the purpose of this payment " of $6,000,000 recommended—not, of course, as for final settlement. The commission, approving and adopting the report of its bureau of finance, March 1, 1921, canceled certificate A–328, dated February 23, 1921, and issued its certificate A–329 as follows:

" Certificate of Interstate Commerce Commission under section 209 (g), transportation act, 1920, as amended by section 212

" To the SECRETARY OF THE TREASURY OF THE UNITED STATES:

" 1. The commission hereby certifies that it has this date cancelled certificate No. A–328, dated the 23rd day of February, 1921, which certified to the Secretary of the Treasury of the United States a
233 payment of six million dollars ($6,000,000) in favor of the Great Northern Railway Company.

" 2. The Interstate Commerce Commission, hereinafter called the commission, hereby certifies that the Great Northern Railway Company, a corporation of the State of Minnesota, hereinafter called the carrier, is a carrier as defined in paragraph (a) of section 209 of the transportation act, 1920, in that it is a carrier by railroad whose railroad or system of transportation was under Federal control at the time such Federal control terminated at 12.01 a. m. on March 1, 1920; that the carrier filed with the commission on or before March 15, 1920, a written statement that it accepted all of the provisions of the said section 209.

" 3. The commission has ascertained and hereby certifies to the Secretary of the Treasury that the amount of six million dollars ($6,000,000) in addition to any other sum or sums heretofore certified in favor of the carrier under section 209 of the transportation act, 1920, is necessary to make good to said carrier the guaranty provided by the said section.

" 4. The commission hereby certifies that such amount of six million dollars ($6,000,000) can not be reduced by further accounting or otherwise, and there may be, upon further investigation, additional amounts found due to said Great Northern Railway Company to make good to said carrier the guaranty of section 209 of the transportation act, 1920, and which if, and when, ascertained by the commission will be certified to the Secretary of the Treasury."

The railroad thus obtained advances aggregating $12,500,000. Several years later the commission, in making its computations for final settlements, made some changes in the formulæ and factors theretofore employed or accepted which materially affected its determination of the amounts ultimately conceived by it to be due to or from the various carriers. June 17, 1925, it issued its certificate A–1041, " under section 209 (g) transportation act, 1920." No reference is made to the amendment of February 26, 1921 (sec. 212).

By this certificate it found that the amount necessary to make good to appellee the guaranty provided by said section 209 is $11,178,887.31; that the carrier had received $12,500,000; and that there was due the United States, on account of overpayment,
234 $1,321,112.69. Demand for this amount was made and payment was refused, and appellant brought suit in the District Court of the District of Minnesota to recover this sum, alleging that the overpayment was made by mistake, and without authority of law. A jury was waived by stipulation of parties. At the close of all the evidence in the trial of this case the following entry appears:

"Attorneys for the respective parties move the court for judgment in favor of the respective parties on the sole ground that the record supports no other disposition of the case, the party whose motion is denied to be allowed an exception."

The court entered a general finding and judgment for appellee.

By the submission of this case to the court under the provisions of Revised Statutes, paragraphs 649 and 700, followed by dual motions for judgment at the conclusion of all the evidence, the general finding of the court was equivalent to the verdict of a jury. The motion for judgment, with exception preserved to its refusal, presents a question of law reviewable by an appellate court. Maryland Casualty Company v. Jones, 279 U. S. 792; White v. United States (C. C. A. 10), 48 Fed. (2d) 178. In such case the appellate court will not reverse for error of fact, such as a finding contrary to the weight of evidence, but will determine whether the record contains substantial and sufficient evidence to support the finding and judgment. Federal Intermediate Credit Bank v. L'Herisson (C. C. A. 8), 33 Fed. (2d) 841, and cases cited in notes; Vicksburg, Shreveport & Pacific Ry. Co. v. Anderson-Tully Co., 256 U. S. 408; United States v. U. S. Fidelity Co., 236 U. S. 512, 527; Dooley v. Pease, 180 U. S. 126; Runkle v. Burnham, 153 U. S. 216, 225; Lehnen v. Dickson, 148 U. S. 71; Case Mfg. Co. v. Soxman, 138 U. S. 431, 438; Hathaway v. Cambridge Nat'l Bank, 134 U. S. 494; Allen v. St. Louis Bank, 120 U. S. 20, 30; Martinton v. Fairbanks, 112 U. S. 670, 672.

The position of the Government is thus stated in its summary of argument:

"The District Court erred in finding and holding that the evidence entitled appellee to judgment, and in denying the Government's motion for judgment made on the ground that the evidence would support no other conclusion."

235 Its contentions are (1) that the evidence establishes a clear case of payment through mistake, and (2) that, "since the evidence positively establishes that a mere estimate and not a definite ascertainment was made by the commission before issuing the certificate on March 1, 1921, the overpayment was made contrary to and without compliance with section 212, and hence was without authority and unlawful."

The right of the Government to recover money paid by mistake is well settled; and of course the commission had no power to authorize

partial payments under section 212 except in amounts definitely ascertained within the meaning of that section. We may resort to the legislative history of that statute to ascertain the great purpose of the act, the environment at the time of its enactment, the reasons that induced its passage, and the relief sought to be granted. Federal Trade Commission v. Raladam Co., 283 U. S. 643, 650; Richbourg Motor Co. v. United States, 281 U. S. 528, 536; United States v. Missouri Pacific R. R. Co., 278 U. S. 269, 278; United States v. Third, 261 U. S. 204, 214; Work v. Braffet, 276 U. S. 560, 566; Standard Oil Co. v. United States, 221 U. S. 1, 50; United States v. Mullendore (C. C. A. 8), 35 Fed. (2d) 78.

While the language of the act itself seems clear, and its meaning unmistakable, the debates attending its passage, conducted largely by members of the committees in charge of the measure, are instructive as emphasizing the predicament of the railroads sought to be relieved, and reveal clearly the true legislative intent. It was contended by some objecting members that the carriers receiving partial payments in advance of final settlement should give security, and contract to repay any amount so received in excess of the guaranty. This position was finally presented in the form of an amendment offered in the House by Mr. Barkley of Kentucky:

"Mr. BARKLEY. Mr. Chairman, I offer an amendment. * * * At the end of line one, page 2, insert: 'Before making such payment or drawing such warrant, unless it be upon a final settlement, the Secretary of the Treasury shall require the carrier to execute a contract on such security as the Secretary of the Treasury may determine, that upon final determination of the amount of the guaranty under sections 204 and 209, such carrier will repay to the United States any amounts which it has received from such
236 partial payment in excess of the guaranty with interest at the rate of 6% per annum from the time such excess was paid.'"

This amendment was lost on division by a vote of 115 to 65, the House standing firmly by the position that, to make this relief effective, the partial payments made should be binding upon the Government, and that the Interstate Commerce Commission should be relied upon to protect its interests by making definite ascertainments. The following from page 2813 of the Congressional Record illustrates this attitude:

"Mr. DENISON said: The Interstate Commerce Commission is the tribunal which we have entrusted with the authority to make these final settlements, and if we can depend upon them to protect the interests of the Treasury in making final settlements, it seems to me we can very well do so in making partial settlements.

"Mr. BARKLEY. But the Interstate Commerce Commission is liable to make mistakes as well as anybody else, and these accounts will be audited by individuals in the Interstate Commerce Commission. Does the gentleman think that the Government should be protected if it should occur that a mistake was made?

"Mr. DENISON. We have got to reach settlements some time. I was informed this morning that the accounting department of the Interstate Commerce Commission is the finest accounting institution of its kind in the United States, if not in the world, and if we can not depend upon it to safeguard the interests of the Treasury in making these settlements, then we ought to endeavor to provide some tribunal upon whom we can depend."

This purpose of Congress to make payments under paragraph (a) of section 212 conclusive and binding is further shown by its discrimination respecting deferred debit and credit items covered by paragraph (b). As originally introduced this paragraph provided that the "reasonable estimate" of the commission respecting these items, when agreed to by the carrier, "shall be binding in final settlement." An amendment was offered striking out the word "binding" and inserting the words "prima facie but not conclusive evidence of their correctness in amount." This amendment was duly debated, and carried. Failure to make a similar provision with respect to the items embraced in paragraph (a) emphasizes the purpose
237 of Congress, elsewhere expressed, to make their ascertainment conclusive and binding on final settlement.

That the commission was fully aware of the purpose and purport of section 212 is established by a letter from its chairman, Hon. Edgar E. Clark, to Hon. John J. Esch, chairman of the House Committee on Interstate and Foreign Commerce, during hearings on this legislation before that committee. This letter, dated January 22, 1921, while the Winslow bill was pending, says in part:

"This morning Representative Sims, member of your committee, called and discussed with me some features of H. R. 15713, more particularly paragraph (b) of section 212.

"Mr. Sims thought that there was difference of understanding as to the intent of the language in this paragraph, and he asked that I write you my conception of the manner in which, if enacted in its present form, it would be interpreted and applied by the commission.

"Paragraph (a) of section 212 very definitely authorizes certificates in partial payment and payment of such certificates. It will be noted that such certificates are by the terms of this paragraph to be 'for any amount definitely ascertained by it (the commission) to be due.' I think there is no misunderstanding in that language. There is no room for misunderstanding of our conception of our duties under it, which is that a partial payment certificate would not be made for any amount in excess of an amount 'definitely ascertained' by us to be due the carrier."

And this respecting paragraph (b):

"The purpose of this paragraph, as I understand it, is to make possible speedy and final settlements under terms fair to the carrier and fair to the Government, and to make final settlement under such an agreement rather than to have some of these claims drag along for many months or years waiting the final determination of the debit

and credit items, which final determination might in small measure affect the balance."

It appears that, when appellee's claim was presented February 14, 1921, representatives of the railroad conferred with the director and assistant director of the commission's bureau of finance and were told that they could get either final settlement or an advance. That
238 it would take about ten days in either case. Mr. Bunting, acting director, suggested "that it might be in defendant's interest to secure an advance rather than a final payment at that time, because there were some items which the commission was disallowing, such as equation on depreciation and retirements, which might later be found by the commission in the carriers' favor and that by securing final settlement at that time, defendant would be compelled to waive those items."

Acting on that suggestion appellee made application for the partial payment.

It can scarcely be maintained that the commission, in discharging the duties imposed upon it by the act of Congress (sec. 212), acted in ignorance of the terms of that law or was mistaken as to its requirements, or as to the facts upon which this partial certificate was issued. This is made evident by the letter of Mr. Clark to the chairman of the committee of the House before which hearings upon the Winslow bill were being held, to the effect that the terms of the act gave no room for misunderstanding of the duty of the commission, which was that no partial-payment certificate should be made for an amount in excess of that definitely ascertained by the commission to be due to the carrier. March 2, 1921, the day after certificate A–329 was issued to appellee, the director of the commission's bureau of finance issued a memorandum to his assistant director in which he said:

"Partial payments will be made upon request by letter provided returns to the commission's orders of October 18, 1920, and January 5, 1921, have been received. Partial payments are not based upon estimates as were advances under section 209 (h), but represent definite ascertainments. For such definite ascertainments the returns under the commission's orders are necessary."

Of course he had not received, over night, the information upon which this memorandum was based. It is to be noted that the carrier's returns to the commission's order of October 18, 1920, were already before that body as a basis for the partial certificate requested. December 14, 1921 (70 I. C. C. 711, 714) the commission said:

"We are required to make a definite ascertainment for partial-payment purposes as clearly as we are required to make a
239 definite ascertainment in final settlements. We shall require all carriers which accepted the provisions of section 209 of the transportation act, 1920, to file with us on or before March 1, 1922, final statements of amounts due to them or to the United States, as the case may be, under the provisions of section 209, and as a general

rule no further partial payments will be certified until the information necessary for a final settlement is at hand. A complete set of forms for making the final returns required is hereto attached marked 'Forms for final return of amounts due to or from the United States under the provisions of section 209 of the transportation act, 1920.

"By our orders of October 18, 1920, and January 5, 1921, we required carriers to furnish certain information to enable us properly to discharge the duties imposed upon us under the guaranty provisions of section 209."

In the report of the commission embraced in the record, it is conceded that the act of February 26, 1921, required definite ascertainments and that the certificate issued was definite in form, based upon the facts as then known. That certificate recited that "such amount of six million dollars ($6,000,000) can not be reduced by further accounting or otherwise, and there may be, upon further investigation, additional amounts found due to said Great Northern Railway Company to make good to said carrier the guaranty of section 209 of the transportation act, 1920, and which if, and when, ascertained by the commission will be certified to the Secretary of the Treasury."

The report says further:

"The intent in these certificates was to leave an ample margin still due and uncertified to protect the interest of the Government."

It would be difficult more precisely to define a "definite ascertainment" within the meaning of section 212. While the ultimate amount on final settlement was not definitely determined, that of the partial payment was fixed beyond the possibility of reduction "by further accounting or otherwise." This inquiry is concerned only with the status of the partial payment. The commission, in its report, suggests that the statute should be read "in the light of the circumstances surrounding its administration." So read, it
240 contemplated partial payments to be made promptly, in advance of the long delay incidental to final settlements—in this case a period of more than four years; this was deemed necessary, as stated in the debates, to prevent "a financial and business condition in this country of such character and such proportions, fraught with so much danger to the public interests, and so disruptive of all the business conditions of the country, that even our supposedly panic proof Federal reserve banking system would not be able to save the country from a panic."

It was, therefore, determined that these partial advances should be definitely ascertained, and that the Interstate Commerce Commission should be the arbiter between the carrier and the Treasury in certifying such advances. Under these circumstances the commission occupies a position closely analogous to that of an umpire or arbitrator agreed upon by contract, in which it is provided that his finding shall be final and binding, unless set aside for fraud, gross mistake, or failure to exercise an honest judgment. United States v. George A. Fuller Co., (C. C. A. 8) 14 Fed. (2d) 813; United States

v. Hurley, (C. C. A. 8) 182 Fed. 776; United States v. Shrewsbury, 23 Wall. 508; Kihlberg v. United States, 97 U. S. 398; Ripley v. United States, 223 U. S. 695; United States v. Mason & Hanger Co., 260 U. S. 323.

Neither fraud, gross mistake, nor failure to exercise an honest judgment, is or can be imputed to the commission in the issuance of certificate A–329. It is suggested that, as found by the Supreme Court in Great Northern Railway v. United States, 277 U. S. 172, the transportation act of 1920 "did not confer upon the commission power to order anything in connection with the issue of certificates" which are, therefore, mere findings of fact; that these certificates are issued to the Secretary of the Treasury and not to the carrier to be benefited. The inference sought to be drawn seems to be that the carrier, therefore, acquired no vested interest in their payment. But the act designated the commission as the tribunal authorized conclusively to find the facts necessary as a basis for payment, and provided that "the authority of and direction to the Secretary of the Treasury under such sections to draw warrants is hereby made applicable to each such certificate."

The grounds upon which the Government has been held entitled to recover for improvident payments made by its officers and
241 agents are mainly where such acts are fraudulent, unauthorized, or clearly mistaken. Fritch v. United States, (C. C. A. 9) 236 Fed. 133; United States v. Olmstead, (C. C. A. 8) 118 Fed. 433; Hunter v. United States, 5 Pet. 172, 188; Pine River Logging Co. v. United States, 186 U. S. 279; United States v. Carr, 132 U. S. 644.

Also, generally, in the absence of statute "the United States is not bound by a mistaken construction of an act of Congress made by one of its officials, and may recover money paid pursuant to such construction." United States v. Gillmore (C. C.), 189 Fed. 761; United States v. Barlow, 132 U. S. 271. In the case last cited this ruling is thus qualified:

"If an allowance is founded upon a clear mistake of fact, not a mere error of judgment, and payments are in consequence made, the statute provides that 'the Postmaster General shall cause suit to be brought to recover such wrong or fraudulent payment of excess with interest,' which means that if such mistake be established in the action of the department a recovery must follow.

* * * * * * *

"It is also true that where the subjects in relation to which the contract of parties is made, are necessarily of an uncertain and speculative character or value, and that is known to the parties, a mere mistake by them in their estimate of the value is not deemed sufficient to authorize a recovery of the moneys paid upon the erroneous estimate. If this were a case of that description no recovery could be had."

Walker v. United States (C. C. Ala.), 139 Fed. 409, held that:

"If officers of the United States are authorized to shape its course of conduct as to a particular transaction, and they have acted within the purview of their authority, their acts or omissions may in a proper case work an estoppel against the Government." (Affirmed (C. C. A. 5), 148 Fed. 1022.)

In Ritter v. United States (C. C. A. 3), 28 Fed. (2d) 265, 267, this language is found:

"The acts or omissions of the officers of the Government, if they be authorized to bind the United States in a particular trans-
242 action, will work estoppel against the Government, if the officers have acted within the scope of their authority."

At this time, as the report of the commission states, allowances for maintenance had been based upon a general formula of the railways, disclosed in their reports in response to the commission's order of October 18, 1920, and elsewhere. The formula and factor subsequently adopted by the commission were not conceived, or at least reported, until many months later. The report of the commission of June 8, 1926, states that its conclusions differed from the railway formula "chiefly in the use of a general equation factor instead of separate factors for each group of maintenance expenditures, in the disallowance of claims based on so-called inefficiency of labor, the use of purchase instead of charge-out prices, the use of separate factors for new and scrap materials, and in the treatment of adjustments for differences in amount and use of property." It will be remembered that in making computations for the issue of the certificate of March 1, 1921, the commission struck from the claim of the carrier all items considered questionable because not at that time fully considered and determined.

We think that, under the authority lodged in it by the act of February 26, 1921, the Interstate Commerce Commission, at the time the partial certificate in controversy was issued, had full power, in its discretion, to adopt and act upon the information and data before it respecting computations to be made in arriving at the definite ascertainment required by the law, and that it did so. The record discloses no mistake either of fact or law, nor that the commission exceeded its authority under the remedial statute. It took affirmative action within the scope of its authority, with no misconception or misconstruction of the terms of that statute, and with full knowledge of the existing facts essential to the determination it was called upon to make. No fraud or collusion is, or could be, claimed. Its conclusion, as evidenced by its certificate of March 1, 1921, is deemed to be conclusive.

In United States v. Louisville, 169 U. S. 249, the claim was that the Government officers had made an error in auditing and allowing the amount of refund of taxes to the city of Louisville, under an act of Congress authorizing and requiring the Secretary of the
243 Treasury and the Commissioner of Internal Revenue to "audit and adjust" the city's claim. The amount allowed had been

paid. Subsequently Congress passed another act entitling the city to a further refund, the amount to be determined in like manner. Under this second authorization, the acting commissioner undertook to reexamine the first claim, reducing it to the extent of $3,548.89, and deducted that sum from the amount allowed on the second claim. The city recovered in the Court of Claims the amount thus deducted. On appeal the Supreme Court said:

"We think the judgment of the Court of Claims is right. By the payment under the act of 1891 the questions involved were ended. It was not only an auditing and allowance by the proper officers of the Treasury of a claim over which they had jurisdiction, but the amount was paid under the direct commandment of an act of Congress specifically appropriating the particular sum reported to it as due to the city of Louisville and for the payment of which the authority of Congress was needed."

We think this language is pertinent to the issue before us. To the same effect see Kendall v. United States, 12 Pet. 524, 610; United States v. Ferreira, 13 Howard 39, 47; Noble v. Union River Logging R. R. Co., 147 U. S. 165.

Our attention has been directed to the decision of the Court of Appeals of the District of Columbia in Northern Pacific Ry Co. v. Interstate Commerce Commission, 23 Fed. (2d) 221. Because of the apparent agreement between commission and carrier, at the suggestion of the latter, that the advance should not be final, and that Liberty bonds, already on deposit, should be held as security for the refund of overpayment, if any, we agree that the decision in that case was correct as applied to the facts before the court. We can not agree, however, that the action of the commission there was responsive to the provisions of section 212, nor can we concur in the conclusions of the court as to the construction of that act, in view of the history of the legislation. With all due respect we feel, therefore, that that decision can not be accepted as persuasive in the case before us.

Because of the importance of the issues involved, we have carried this discussion beyond the limits required for a determination
244 of whether the record discloses substantial evidence sufficient to support the finding and judgment of the trial court. Our conclusion is that not only is the judgment supported by substantial evidence, but that, upon the whole record, that judgment should be affirmed. It is so ordered.

Filed March 15, 1932.

245 *Judgment*

United States Circuit Court of Appeals, Eighth Circuit

March Term, 1932

TUESDAY, MARCH 15, 1932.

No. 9334

UNITED STATES OF AMERICA, APPELLANT

vs.

GREAT NORTHERN RAILWAY COMPANY

Appeal from the District Court of the United States for the District of Minnesota.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed without costs to either party in this court.

March 15, 1932.

246 *Clerk's certificate*

United States Circuit Court of Appeals, Eighth Circuit

I, E. E. Koch, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Minnesota as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, and full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States in a certain cause in said Circuit Court of Appeals wherein the United States of America was appellant and the Great Northern Railway Company was appellee, No. 9334, as full, true, and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the fifteenth day of April, A. D. 1932, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the judges of the District Court of the United States for the District of Minnesota.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the city of St. Louis, Missouri, this eleventh day of May, A. D. 1932.

[SEAL.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1932

Supreme Court of the United States

Order allowing certiorari

Filed May 31, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted, and the case is advanced and assigned for argument on Monday, October 10th next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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CHARLES ELMORE

No. 96

In the Supreme Court of the United States

OCTOBER TERM, 1931

THE UNITED STATES OF AMERICA, PETITIONER

v.

GREAT NORTHERN RAILWAY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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In the Supreme Court of the United States

OCTOBER TERM, 1931

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THE UNITED STATES OF AMERICA, PETITIONER

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Eighth Circuit, entered in the above entitled cause on March 15, 1932 (R. 239), affirming a judgment of the District Court for the District of Minnesota (R. 31), denying recovery by the United States of the amount by which it had, as certified by the Interstate Commerce Commission, overpaid to respondent the guaranty authorized by Section 209 of the Transportation Act, 1920.

QUESTIONS PRESENTED

1. Whether a "partial payment" pursuant to Section 212 of the Transportation Act, 1920, of the guaranty authorized by Section 209 of that Act is final and binding upon the United States and precludes recovery of an overpayment of the guaranty, as later determined by the Interstate Commerce Commission.

2. Whether, if the first question is answered affirmatively, the payment to respondent pursuant to Section 212 was invalid because the Commission did not, as required by the Section, definitely ascertain that said sum was due on the guaranty.

STATUTE INVOLVED

The pertinent provisions of the Transportation Act, 1920, are set forth in the Appendix, pp. 22–25, *infra*.

STATEMENT

This is a suit to recover $1,329,785.98, with interest, representing the difference between $12,500,000 (of which $6,500,000 was paid as advances and $6,000,000 as a partial payment) and $11,170,214.02, which the Interstate Commerce Commission finally determined was the amount of respondent's guaranty under Section 209 of the Transportation Act, 1920.

The Transportation Act, 1920, provided for terminating Federal control of the railroads on March 1, 1920. (41 Stat. 457.) By Section 209 (c) of the Act the United States guaranteed to each carrier

which had been under Federal control, and to certain others, that its railway operating income for the following six months should be not less than one-half of the amount of the annual compensation to which it was entitled during the period of Federal control. (*Infra,* p. 22.) Section 209 (g) provided that the Interstate Commerce Commission should, as soon as practicable, ascertain and certify to the Secretary of the Treasury the amounts necessary to make good this guaranty and directed the latter to draw warrants in payment of such certificates. (*Infra,* p. 23.) Section 209 (h) authorized the Commission, to issue to the Secretary of the Treasury certificates for advance payments, upon application therefor during the guaranty period, such advances to be not in excess of the "estimated amount" necessary to make good the guaranty: (*Infra,* p. 24.) The section further provided that the Secretary should not pay such advances until the carrier had executed a contract, "secured in such manner as the Secretary may determine," to repay any amounts received from such advances in excess of the guaranty. (*Infra,* p. 24.)

During the guaranty period respondent applied for $6,500,000 in advances and during 1920 certificates totaling this amount were issued and paid. (R. 16, 28, 39.) On February 14, 1921, respondent filed with the Commission its guaranty claim, amounting to approximately $18,500,000. (R. 41.)

The supporting data filed therewith consisted of a book of 119 pages of tables and statistical matter. (R. 57.) Two days later, February 16th, respondent by letter advised the Commission that it required a $6,000,000 advance in order to meet pressing obligations. (R. 136–137.) Recognizing that under existing law such advance payment could not be made because not applied for during the guaranty period, respondent requested a certificate for this sum to be used, not later than February 24th, "as collateral for a bank loan." (R. 137.)

On February 16, 1921,[1] the chief accountant of the Bureau of Finance of the Commission, who had charge of the examination of returns submitted in support of guaranty claims, began examining respondent's return, assisted by employees of the Bureau working under him. (R. 36–37, 46, 59.) He worked upon this return under instructions to make calculations along the same lines as those which were made when respondent's previous applications were under consideration (R. 46), the latter having required simply a determination that the amounts applied for were not in excess of the "estimated amount" of the guaranty (*supra*, p. 3). It was understood that the certificate was to be used, "not with the expectation of getting money from the United States Treasury," but for credit purposes. (R. 47.)

[1] The chief accountant appears to have been in error in stating on cross-examination (R. 59, 60) that examination of the return began February 14, 1921. (See R. 46, 97.)

Important principles entering into the calculation of the guaranty were then under consideration by the Commission and unsettled. (R. 47.) One of these involved the allowance for maintenance, which required estimating the ratio or ratios to be applied in determining the increased cost of labor and materials in the guaranty period as compared with the "test" period. (R. 44, 58–59.) In this situation, the figures in the return were mathematically checked and "obviously unallowable items or seemingly obviously unallowable items" were eliminated. (R. 74, 98.) The result was to reduce respondent's claim from about $18,500,000 to about $15,700,000 which, after certifying an additional $6,000,000, "would apparently leave a sufficient margin [about $3,200,000] for possible future deductions after the Commission had determined the principles" to be applied in fixing maintenance and other matters which were then under consideration. (R. 74, 212.) The Commission was informed of the principles upon which respondent had calculated its claim, but the Commission neither accepted nor rejected them (except those involved in eliminated items). (R. 58–59, 119.) The chief accountant testified that the examination was "superficial," "very perfunctory," that it was "a pure and simple estimate on our part," that "no part of it whatsoever had any intent of finality" and that he did not regard the Bureau's examina-

tion "as being a sufficient basis for a definite ascertainment for making a Section 212 certificate." (R. 47, 48, 55, 93–94.)

The report of the Bureau of Finance to Division 4 of the Commission, which had charge of guaranty claims, shows $15,705,688 as "Estimated amount necessary to make good the guaranty." (R. 212.) In four other places in the report the Bureau characterizes the conclusions which it had reached as an "estimate" or "estimated." (R. 211–213.) The report recommended "a partial payment for credit purposes only of $6,000,000." (R. 213.) The memorandum forwarding the report to Division 4 is dated February 21, 1921, but the report itself bears the date of February 19, 1921, indicating that it was completed three days after respondent first applied for the certificate. (R. 210, 213.) The Commission's certificate for $6,000,000 was issued February 23, 1921, and forwarded to the Secretary of the Treasury on the same date with a letter stating that the Commission understood that "the present certificate is desired purely for use as the basis of credit with this company's bankers." (R. 133, 134.)

On February 26, 1921, the so-called Winslow bill was enacted, amending the Transportation Act, 1920, by adding a new section designated Section 212. That Section authorized the Commission, if not at the time able finally to determine the whole amount due under Section 209, to certify as a par-

tial payment "any amount definitely ascertained by it to be due." (*Infra,* pp. 24–25.) The Secretary of the Treasury was authorized to pay these certificates, no security from the carrier being required. (*Infra,* p. 25.)

By letter dated February 28, 1921, respondent called the Commission's attention to the change in the law and requested, in lieu of the certificate of February 23, 1921, a new certificate for $6,000,000 with which it could obtain funds from the Treasury. (R. 138–139.) The Bureau of Finance acted upon this application the same day and, without any further examination or consideration of respondent's return, recommended on February 28, 1921, in favor of such a certificate. (R. 49, 214–217.) The Bureau changed its earlier report merely to make it conform to the language of the new section of the Act, eliminating the words "estimate" and "estimated" and recommended cancellation of the earlier certificate. (R. 50, 215–217.) On the following day, March 1, 1921, the Commission issued to the Secretary of the Treasury a second certificate for $6,000,000 and cancelled its certificate of February 23, 1921. (R. 22.) The Secretary of the Treasury shortly thereafter paid respondent this $6,000,000. (R. 16, 28.)

On July 3, 1922, respondent filed in support of its guaranty claim a final return which included all items entered on its books to December 31, 1921. (R. 51.) This return was checked against respond-

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ent's books and its annual and monthly reports, and in the examination various principles determined by the Commission after March 1, 1921, were applied. (R. 44–46, 53, 71.) The result was that the Commission by Division 4 (99 I. C. C. 231) under date of June 17, 1925, issued a report and certificate making a final determination, pursuant to Section 209 (g), of respondent's guaranty at $11,178,887.31. (R. 178–183.) Upon respondent's application, the case was reopened and argued before the full Commission which on June 8, 1926 (111 I. C. C. 318), issued a report and amended certificate fixing respondent's guaranty at $11,170,-214.02. (R. 183–207.)

Respondent then brought suit under the Act of June 18, 1910, c. 309, 36 Stat. 539, as amended by the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220, to annul the Commission's certificate of June 17, 1925, and its amended certificate of June 8, 1926. This Court affirmed the lower court's decree dismissing the bill for want of jurisdiction. *Great Northern Railway Co.* v. *United States,* 277 U. S. 172.

In its original complaint in this proceeding the United States set forth the payments to respondent aggregating $12,500,000, the Commission's final amended certificate fixing the amount of respondent's guaranty at approximately $11,170,000, and respondent's refusal to repay the difference of about $1,330,000. (R. 1–5.) The District Court

sustained a demurrer to this complaint, holding that Section 212 of the Transportation Act, 1920, made certificates issued thereunder final and binding upon the United States. (R. 7–14.) The United States then filed an amended complaint containing the additional allegation that the overpayment to respondent was made "through mistake and without authority of law." (R. 14–18.) The case was tried to the court, trial by jury being waived. (R. 29.) After trial each party moved for judgment. (R. 31.) The court delivered an oral opinion, holding that the Commission's certificate under Section 212 was not issued by mistake or without authority of law. (R. 121–129.) On appeal, the Circuit Court of Appeals held that the District Court had correctly interpreted the statute and that its judgment on the merits was sustained by the evidence. (R. 226–239.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred (1) in holding that a payment made pursuant to a certificate issued under Section 212 of the Transportation Act, 1920, is final and binding upon the United States, and (2) in holding that the finding of the District Court that the Commission's certificate of March 1, 1921, was not made through mistake or without authority of law was sustained by the evidence.

REASONS FOR GRANTING THE WRIT

1. This Court has not heretofore passed upon the question whether payment to a carrier pursuant to a certificate issued under Section 212 of the Transportation Act, 1920, is final and binding upon the United States so as to preclude recovery of an overpoyment, certified by the Interstate Commerce Commission upon its final determination of the amount of the guaranty authorized by Section 209. A decision thereon by this Court is of general public importance since in at least 28 cases the Commission, upon final determination of the guaranty, has found a previous overpayment. (R. 187.) In 22 of the 28 cases the carrier has refunded or promised to refund the overpayment. (R. 187.) Overpayments under Section 212 aggregate about $3,780,000 and, exclusive of the instant case, about $2,450,000; of this amount about $2,260,000 (including interest) has been refunded to the United States. If the decision below is not reviewed by this Court, numerous suits will undoubtedly be brought against the United States to recover the amounts refunded to it on account of overpayments under Section 212.

2. The decision of the Circuit Court of Appeals holding that payment of a certificate issued under Section 212 is final and binding upon the United States is in direct conflict with the decision of the Court of Appeals of the District of Columbia in *Northern Pacific Ry. Co.* v. *Interstate Commerce*

Commission, 23 F. (2d) 221, certiorari denied, 275 U. S. 572. In that case the carrier filed in the Supreme Court of the District of Columbia a petition for a common law writ of certiorari to review and set aside a final certificate issued by the Commission under Section 209 (g) of the Transportation Act, 1920. The carrier contended that this certificate was beyond the scope of the Commission's powers and null and void because for less than the aggregate amount of prior certifications under Section 209 (h) and Section 212. The Court of Appeals rejected this contention, saying (p. 224) that Section 212 was "an emergency measure" and that if the Commission had adopted the carrier's interpretation of the Section, "the real purpose of Congress would have been frustrated, since of necessity considerable delay would have ensued." Both courts below recognized that their construction of Section 212 was in conflict with that of the court in the *Northern Pacific Co.* case. (R. 12, 243.)

3. A review of the decision below holding that there was sufficient evidence to support the finding that the Commission's certificate of March 1, 1921, was not made through mistake or without authority of law is also of importance. This is primarily not a question of fact, but a question of law, depending upon an interpretation of what kind of a determination by the Commission is required by Section 212. The evidence is uncontradicted that

the employee charged with the duty of examining, on behalf of the Commission, respondent's return did not in his examination do more than estimate the amount of respondent's guaranty, and that the Bureau of Finance in reporting the result of this examination to the Commission expressly characterized its conclusions as estimates. Nevertheless, the only authority conferred upon the Commission by Section 212 is to certify as a "partial payment" any amount "definitely ascertained by it to be due." That the question of what constitutes a valid determination by the Commission under Section 212 may arise in other litigation if this case is not reviewed by this Court, is indicated by the similarity between the facts of this case and those in *Northern Pacific Ry. Co.* v. *Interstate Commerce Commission, supra,* where an overpayment of about $1,320,000 was made on a certificate issued four days after the enactment of Section 212.

THOMAS D. THACHER,
Solicitor General.

MAY, 1932.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the District Court on the demurrer (R. 7) is reported in 46 F. (2d) 999. The opinion of the District Court upon the merits (R. 121) and that of the Circuit Court of Appeals (R. 227) have not been reported. The reports of the Interstate Commerce Commission upon final determination of respondent's guaranty are reported as *Guaranty Settlement with Great Northern Railway Co.*, 99 I. C. C. 231, and 111 I. C. C. 318.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 15, 1932. (R. 239.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED, STATEMENT, ETC.

The questions presented, statute involved, statement of the case, and specification of errors relied upon are set out in the petition and in the Appendix, *infra*, pp. 22–25.

ARGUMENT

I

CERTIFICATIONS UNDER SECTION 212 OF THE TRANSPORTATION ACT, 1920, ARE NOT FINAL AND BINDING UPON THE UNITED STATES

Respondent has not set up any defense in the nature of estoppel; that is, that it in any way changed its position in reliance upon the understanding that the payment to it under Section 212 was a *pro tanto* final settlement. It necessarily admits that the Commission, which under the statute was the final arbiter of the amount of the guaranty, has found that respondent has received from the United States more than the amount of the guaranty payable to it under Section 209. It rests upon the technical defense that Section 212 bars the recovery of this overpayment.

Section 212 does not expressly bar recovery by the United States of an overpayment made thereunder. We submit that its wording indicates the contrary. The section authorizes a "partial payment." A payment which is in excess of the total obligation cannot be said to be a partial payment thereof.

The Circuit Court of Appeals appears to have regarded Section 212 as authorizing certificates having the same force and effect as certificates under Section 209 (g) determining the full amount of the guaranty. The latter section does not expressly prohibit subsequent correction of the certificates

which it authorizes, but such prohibition may perhaps be implied, to the end that finality should be imparted to the Commission's final determinations. No such reason of policy exists for imparting finality to the determinations of the Commission in passing upon applications for partial payments, which presuppose further consideration and further determination.

We submit that the construction of Section 212 adopted by the courts below is inconsistent with the avowed purpose of Congress in enacting this section. The purpose was to give relief to the railroads in the credit crisis which then confronted them by making immediately available to them a part of the guaranty which they would ultimately receive from the Government.[2] Such purpose presupposed prompt and necessarily tentative decisions by the Commission. But it was also the duty of the Commission to guard against overpayments of the guaranty. It could not, consistently with this duty, authorize the early payments contemplated by Congress if, when doing so, it was finally concluding the rights of the United States and barring the recovery of any payments later found to be excessive.

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[2] See statement of Chairman of House Committee on Interstate Commerce when reporting the bill which became the Act of February 26, 1921 (Cong. Rec., vol. 60, pt. 3, p. 2737), and the House Committee's report on the bill (H. Rep. No. 1243, 66th Cong., 3rd Sess., p. 3).

The Circuit Court of Appeals (R. 235–236) gave weight to the fact that Section 209 (h) made the payment of advances contingent upon the carrier's execution of a contract, secured as the Secretary of the Treasury might determine, to repay any advance received in excess of the guaranty, and that the House rejected an amendment which would have added this requirement to payment of certificates under Section 212. The proposed amendment was opposed on two grounds, first, that it would interfere with the effectiveness of the relief to carriers since many short lines could not furnish adequate security and, second, that there would in fact be no overpayments since the Interstate Commerce Commisison was authorized to certify only those amounts which it had definitely ascertained were due. (Cong. Rec., vol. 60, pt. 3, pp. 2812–2814.) We submit that rejection of the amendment under these circumstances does not show that Congress intended by Section 212 to bar the United States from recovering payments made thereunder if in excess of what was finally determined to be due. Such a construction of Section 212 brings it into conflict with Section 209 (g), under which the amount of the guaranty was to be determined by the Commission and liquidated by the Secretary of the Treasury.

In the courts below respondent urged that paragraph (b) of Section 212 supports its construction of the statute. That paragraph provides that the

Commission, in computing partial payment certificates, may include an estimate of the net effect of deferred credits and debits provided the interested carrier has agreed to the estimate. (*Infra*, p. 25.) It also provides that any amount so agreed to shall be prima facie but not conclusive evidence of its correctness in final settlement. From this provision respondent draws the inference that all other items included in the computation of partial payment certificates were to be conclusive in final settlement. The inference seems wholly unwarranted. The explanation of the provision is that Congress was providing for something in the nature of a settlement as to deferred items, and, without the express contrary declaration in the statute, this settlement might have been regarded as conclusive, as the bill originally provided. (Cong. Rec., vol. 60, pt. 3, p. 2736.)

It is a familiar rule of construction that statutes granting privileges or relinquishing rights must be construed favorably to the Government. *Caldwell* v. *United States*, 250 U. S. 14, 20; *Slidell* v. *Grandjean*, 111 U. S. 412, 437. We submit that the rule is applicable here. While the guaranty authorized by Section 209 is not a gift or subsidy, it is also not in fulfillment of any legal obligation, and, broadly speaking, it authorized a large payment of public funds without substantial consideration therefor. See *Texas & Pacific Ry. Co.* v. *United States*, No. 634, decided by this Court May 16, 1932.

II

THE COMMISSION ISSUED ITS PARTIAL-PAYMENT CERTIFICATE OF MARCH 1, 1921, THROUGH MISTAKE OR WITHOUT AUTHORITY OF LAW

Section 212 authorizes the Commission to certify as partial payments only amounts "definitely ascertained by it to be due." The courts would probably hesitate, in the absence of convincing evidence, to hold that the Commission had issued a certificate under Section 212 without the definite ascertainment required by law. But it is our contention that there is convincing evidence that the Commission did not prior to March 1, 1921, definitely ascertain that an additional $6,000,000 was due respondent on account of the guaranty.

It can, we believe, be contended with great force that until the Commission had determined the basic principles to be applied in computing the guaranty, it was not possible definitely to ascertain that any particular amount was due on account of the guaranty to respondent. It does not seem reasonable to suppose that the statute authorized the Commission definitely to ascertain any amount as due until it had determined the underlying principles to be applied, at least if the statute meant that any decision then made by the Commission forever concluded the rights of the United States. But in this case there is convincing additional evidence that the Commission did not make a definite ascertainment.

The Commission's only examination of respondent's data was prior to the enactment of Section 212. (*Supra,* p. 7.) The accountant of the Bureau of Finance, who had charge of the examination, was instructed to make the same kind of examination as those made upon applications for advances, which required merely an estimate of the guaranty. (*Supra,* p. 4.) The examination was made with the understanding that the certificate requested would be used for credit purposes only, not for obtaining money from the United States Treasury. (*Supra,* p. 4.) The Bureau of Finance, in reporting to the Commission, characterized the conclusions reached as estimates. (*Supra,* p. 6.) When the law was changed the Bureau merely revised its report to conform to the language of Section 212, eliminating the words "estimate" and "estimated." (*Supra,* p. 7.) But if the examination when first made only resulted in an estimate, it did not become something different by being later called an ascertainment.

In its computation of respondents partial-payment certificate, the Commission did not eliminate deferred items from the total of respondent's claim, which at the end of the guaranty were a little over $1,000,000. (R. 66, 215–217.) Prior to issuing its certificate of March 1, 1921, no agreement was reached with the carrier as to the net effect of deferred items. (R. 66, 215–217.) The inclusion of deferred items in the computation without such an

agreement with the carrier was in violation of paragraph (b) of Section 212. We submit that on this ground alone the Commission's certificate was invalid.

Briefly, what the Commission did was this: It eliminated those items in respondent's claim which on a hasty examination it considered "seemingly obviously unallowable." This reduced respondent's claim to approximately $15,700,000, of which $6,500,000 had been advanced. Respondent had applied for a certificate for $6,000,000, which would make the total certifications $12,500,000. The Commission, estimating that the margin of $3,200,000, or about 20%, would cover errors, certified an additional $6,000,000. We submit that, if under Section 212 any decision made thereunder by the Commission forever concluded the United States, the statute required a more definite ascertainment than this.

CONCLUSION

The decision of the Circuit Court of Appeals in this case is in conflict with the decision of the Court of Appeals of the District of Columbia in *Northern Pacific Ry. Co.* v. *Interstate Commerce Commission*, 23 F. (2d) 221, *supra*. A decision by this Court on the issues here presented is of the utmost importance in order that it may be finally determined whether the United States is entitled to recover overpayments made under Section 212 of the

Transportation Act, 1920, and whether it is entitled to retain such overpayments when they have been refunded. It is therefore respectfully submitted that the petition for certiorari should be granted.

THOMAS D. THACHER,
Solicitor General.
JOHN LORD O'BRIAN,
The Assistant to the Attorney General.
CHARLES H. WESTON,
ELMER B. COLLINS,
Special Assistants to the Attorney General.

MAY, 1932.

APPENDIX

Section 209 of the Transportation Act, 1920, c. 91, 41 Stat. 464, 465, 466 (U. S. C., Title 49, sec. 77), provides:

> SEC. 209 (a). When used in this section—
>
> The Term "carrier" means (1) a carrier by railroad or partly by railroad and partly by water, whose railroad or system of transportation is under Federal control at the time Federal control terminates, or which has heretofore engaged as a common carrier in general transportation and competed for traffic, or connected, with a railroad at any time under Federal control; * * *.
>
> The term "guaranty period" means the six months beginning March 1, 1920.
>
> The term "test period" means the three years ending June 30, 1917; * * *.
>
> (b) This section shall not be applicable to any carrier which does not on or before March 15, 1920, file with the Commission a written statement that it accepts all the provisions of this section.
>
> (c) The United States hereby guarantees—
>
> (1) With respect to any carrier with which a contract (exclusive of so-called co-operative contracts or waivers) has been made fixing the amount of just compensation under the Federal Control Act, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one-half the amount named in such contract as annual compensation, * * *.
>
> * * * * *

(f) In computing railway-operating income, or any deficit therein, for the guaranty period for the purposes of this section—

* * * * *

(3) There shall not be included in operating expenses, for maintenance of way and structures, or for maintenance of equipment, more than an amount fixed by the Commission. In fixing such amount the Commission shall so far as practicable apply the rule set forth in the proviso in paragraph (a) of section 5 of the "standard contract" between the United States and the carriers (whether or not such contract has been entered into with the carrier whose railway-operating income is being computed);

* * * * *

(5) The Commission shall require the elimination and restatement of the operating expenses and revenues (other than for maintenance of way and structures, or maintenance of equipment) for the guaranty period, to the extent necessary to correct and exclude any disproportionate or unreasonable charge to such expenses or revenues for such period, or any charge to such expenses or revenues for such period which under a proper system of accounting is attributable to another period.

(g) The Commission shall, as soon as practicable after the expiration of the guaranty period, ascertain and certify to the Secretary of the Treasury the several amounts necessary to make good the foregoing guaranty to each carrier. The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States, for the amount shown in such certificate as necessary to make good such guar-

anty. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated.

(h) Upon application of any carrier to the Commission, asking that during the guaranty period there may be advanced to it from time to time such sums, not in excess of the estimated amount necessary to make good the guaranty, as are necessary to enable it to meet its fixed charges and operating expenses, the Commission may certify to the Secretary of the Treasury the amount of, and times at which, such advances, if any, shall be made. The Secretary of the Treasury, on receipt of such certificate, is authorized and directed to make the advances in the amounts and at the times specified in the certificate, upon the execution by the carrier of a contract, secured in such manner as the Secretary may determine, that upon final determination of the amount of the guaranty provided for by this section such carrier will repay to the United States any amounts which it has received from such advances in excess of the guaranty, with interest at the rate of 6 per centum per annum from the time such excess was paid. There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, a sum sufficient to enable the Secretary of the Treasury to make the advances referred to in this subdivision.

* * * * *

The Act of February 26, 1921, c. 72, 41 Stat. 1145 (U. S. C., Title 49, sec. 79) provides:

That the Transportation Act, 1920, is hereby amended by adding after section 211 a new section to read as follows:

SEC. 212. (a) In making certifications under section 204 or section 209, the Commis-

sion, if not at the time able finally to determine the whole amount due under such section to a carrier or the American Railway Express Company, may make its certificate for any amount definitely ascertained by it to be due, and may thereafter in the same manner make further certificates, until the whole amount due has been certified. The authority of and direction to the Secretary of the Treasury under such sections to draw warrants is hereby made applicable to each such certificate. Warrants drawn pursuant to this section, whether in partial payment or in final payment, shall be paid: (1) If for a payment in respect to reimbursement of a carrier for a deficit during the period of Federal control, out of the appropriation made by section 204; (2) if for a payment in respect to the guaranty to a carrier other than the American Railway Express Company, out of the appropriation made by subdivision (g) of section 209; and (3) if for a payment in respect to the guaranty to the American Railway Express Company, out of the appropriation made by the fifth paragraph of subdivision (i) of section 209.

(b) In ascertaining the several amounts payable under either of such sections, the Commission is authorized, in the case of deferred debits and credits which can not at the time be definitely determined, to make, whenever in its judgment practicable, a reasonable estimate of the net effect of any such items, and, when agreed to by the carrier or express company, to use such estimate as a definitely ascertained amount in certifying amounts payable under either of such sections, and such estimates so agreed to shall be prima facie but not conclusive evidence of their correctness in amount in final settlement.

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FILE COPY

SEP 20

No. 96

In the Supreme Court of the United States

OCTOBER TERM, 1932

THE UNITED STATES OF AMERICA, PETITIONER

v.

GREAT NORTHERN RAILWAY COMPANY

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the District Court on demurrer (R. 7) is reported in 46 F. (2d) 999. The opinion of the District Court on the merits (R. 121) has not been reported. The opinion of the Circuit Court of Appeals (R. 226) is reported in 57 F. (2d) 385. The reports of the Interstate Commerce Commission upon final determination of the respondent's guaranty are reported as *Guaranty Settlement with Great Northern Railway Co.*, 99 I. C. C. 231, and 111 I. C. C. 318.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 15, 1932. (R. 239.) A petition for a writ of certiorari was filed May 21, 1932, and granted May 31, 1932. (R. 241.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the United States may recover an overpayment made by the Interstate Commerce Commission.

2. Whether a "partial payment" pursuant to Section 212 of the Transportation Act, 1920, of the guaranty authorized by Section 209 of that Act is final and binding upon the United States and precludes recovery of an overpayment of the guaranty, as later determined by the Interstate Commerce Commission.

3. Whether, if the first question is answered affirmatively, payment to respondent pursuant to Section 212 of a sum in excess of the amount later determined by the Commission to be due respondent under Section 209 was invalid because the Commission did not, as required by Section 212, definitely ascertain that such sum was due on the guaranty.

STATUTE INVOLVED

The pertinent portions of the Transportation Act, 1920, are set forth in the Appendix, *infra*, pp. 32–36.

STATEMENT

This is a suit to recover $1,329,785.89, with interest, representing the difference between $12,500,000 (of which $6,500,000 was paid as advances under Section 209 (h) of the Transportation Act, 1920, and $6,000,000 as a partial payment under Section 212 of that Act) and $11,170,214.02, which the Interstate Commerce Commission finally determined was the amount of respondent's guaranty under Section 209.

The Transportation Act, 1920, provided for terminating Federal control of railroads on March 1, 1920. (41 Stat. 457.) By Section 209 (e) of the Act (*infra*, p. 32), the United States guaranteed to each carrier which had been under Federal control, and to certain others, that its railway operating income for the following six months should be not less than one-half of the amount of the annual compensation to which it was entitled during the period of Federal control. Section 209 (g) (*infra*, p. 33) provided that the Interstate Commerce Commission should, as soon as practicable, ascertain and certify to the Secretary of the Treasury the amounts necessary to make good this guaranty and directed the latter to draw warrants in payment of such certificates. Section 209 (h) (*infra*, p. 34) authorized the Commission to issue to the Secretary of the Treasury certificates for advance payments, upon application therefor during the guaranty period, such advances to be not in excess of

the "estimated amount" necessary to make good the guaranty. The section further provided that the Secretary should not pay such advances until the carrier had executed a contract, "secured in such manner as the Secretary may determine," to repay any amounts received from such advances in excess of the guaranty.

During the guaranty period the respondent applied for $6,500,000 in advances and during 1920 certificates totalling this amount were issued and paid. (R. 16, 28, 39.) On February 14, 1921, the respondent filed with the Commission its guaranty claim amounting to approximately $18,500,000. (R. 41.) The supporting data filed therewith consisted of a book of 119 pages of tables and statistical matter. (R. 57.) Two days later, February 16th, respondent by letter advised the Commission that it required a $6,000,000 advance in order to meet pressing obligations. (R. 136–137.) Recognizing that under existing law such advance payment could not be made because not applied for during the guaranty period, respondent requested a certificate for this sum to be used not later than February 24th "as collateral for a bank loan." (R. 137.)

On February 16, 1921,[1] the chief accountant of the Bureau of Finance of the Commission, who had charge of the examination of returns submitted in support of guaranty claims, began examining re-

[1] The chief accountant appears to have been in error in stating on cross-examination (R. 59–60) that examination of the return began February 14, 1921. (R. 46, 97.)

spondent's return, assisted by employees of the Bureau working under him. (R. 36–37, 46, 59.) He worked upon this return under instructions to make calculations along the same lines as those which were made when respondent's previous applications were under consideration (R. 46), the latter having required simply a determination that the amounts applied for were not in excess of the "estimated amount" of the guaranty. It was understood that the certificate was to be used "not with the expectation of getting money from the United States Treasury" but for credit purposes. (R. 47.)

Important principles entering into the calculation of the guaranty were then under consideration by the Commission and unsettled. (R. 47.) One of these involved the allowance for maintenance, which required estimating the ratio or ratios to be applied in determining the increased cost of labor and materials in the guaranty period as compared with the "test" period. (R. 44, 58–59.) In this situation the figures in the return were mathematically checked and "obviously unallowable items or seemingly obviously unallowable items" were eliminated. (R. 74, 98.) The result was to reduce respondent's claim from about $18,500,000 to about $15,700,000 which, after certifying an additional $6,000,000, "would apparently leave a sufficient margin [about $3,200,000] for possible future deductions after the Commission had determined the

principles" to be applied in fixing maintenance and other matters which were then under consideration. (R. 74, 212.) The Commission was informed of the principles upon which respondent had calculated its claim, but the Commission neither accepted nor rejected them (except those involved in eliminated items). (R. 58–59, 119.) The chief accountant testified that the examination was "superficial," "very perfunctory," that it was "a pure and simple estimate on our part," that "no part of it whatsoever had any intent of finality" and that he did not regard the Bureau's examination "as being a sufficient basis for a definite ascertainment for making a Section 212 certificate." (R. 47, 48, 55, 93–94.)

The report of the Bureau of Finance to Division 4 of the Commission, which had charge of guaranty claims, shows $15,705,688 as "Estimated amount necessary to make good the guaranty." (R. 212.) In four other places in the report the Bureau characterizes the conclusions which it had reached as an "estimate" or "estimated." (R. 211–213.) The report recommended "a partial payment for credit purposes only of $6,000,000." (R. 213.) The memorandum forwarding the report to Division 4 is dated February 21, 1921, but the report itself bears the date of February 19, 1921, indicating that it was completed three days after respondent first applied for the certificate. (R. 210, 213.) The Commission's certificate for $6,000,000 was is-

sued February 23, 1921, and forwarded to the Secretary of the Treasury on the same date with a letter stating that the Commission understood that "the present certificate is desired purely for use as the basis of credit with this company's bankers." (R. 133, 134.)

On February 26, 1921, the so-called Winslow bill was enacted, amending the Transportation Act, 1920, by adding a new section designated Section 212 (*infra*, p. 35). That section authorized the Commission, if not at the time able finally to determine the whole amount due under Section 209, to certify as a partial payment "any amount definitely ascertained by it to be due." The Secretary of the Treasury was authorized to pay these certificates, no security from the carrier being required.

By letter dated February 28, 1921, respondent called the Commission's attention to the change in the law and requested, in lieu of the certificate of February 23, 1921, a new certificate for $6,000,000 with which it could obtain funds from the Treasury. (R. 138–139.) The Bureau of Finance acted upon this application the same day and, without any further examination or consideration of respondent's return, recommended on February 28, 1921, in favor of such a certificate. (R. 49, 214–217.) The Bureau changed its earlier report merely to make it conform to the language of the new section of the Act, eliminating the words "estimate" and "estimated," and recommended cancellation of the

earlier certificate. (R. 50, 215–217.) On the following day, March 1, 1921, the Commission issued to the Secretary of the Treasury a second certificate for $6,000,000 and cancelled its certificate of February 23, 1921. (R. 22.) The Secretary of the Treasury shortly thereafter paid the respondent the $6,000,000. (R. 16, 28.)

On July 3, 1922, the respondent filed in support of its guaranty claim a final return which included all items entered on its books to December 31, 1921. (R. 51.) This return was checked against the respondent's books and its annual and monthly reports, and in the examination various principles determined by the Commission after March 1, 1921, were applied. (R. 44–46, 53, 71.) The result was that the Commission, by Division 4 (99 I. C. C. 231), under date of June 17, 1925, issued a report and certificate making a final determination pursuant to Section 209 (g) of respondent's guaranty at $11,178,887.31. (R. 178–183.) Upon respondent's application the case was reopened and argued before the full Commission which, on June 8, 1926 (111 I. C. C. 318), issued a report and amended certificate fixing respondent's guaranty at $11,170,-214.02. (R. 183–207.)

Respondent then brought suit under the Act of June 18, 1910, c. 309, 36 Stat. 539, as amended by the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220, to annul the Commission's certificate of June 17, 1925, and its amended certificate of

June 8, 1926. This Court affirmed the lower court's decree dismissing the bill for want of jurisdiction. *Great Northern Railway Co.* v. *United States,* 277 U. S. 172.

In its original complaint in this proceeding, the United States set forth the payments to respondent aggregating $12,500,000, the Commission's final amended certificate fixing the amount of respondent's guaranty at approximately $11,170,000, and respondent's refusal to pay the difference of about $1,330,000. (R. 1–5.) The District Court sustained a demurrer to this complaint, holding that Section 212 of the Transportation Act, 1920, made certificates issued thereunder final and binding upon the United States. (R. 7–14.) The United States then filed an amended complaint containing the additional allegations that the overpayment to respondent was made through mistake and without authority of law. (R. 14–18.) This allegation was put in issue by the respondent's answer. (R. 28.) The case was tried to the court, trial by jury being waived. (R. 29.) After trial each party moved for judgment. (R. 31.) The court delivered an oral opinion, holding that the Commission's certificate under Section 212 was not issued by mistake or without authority of law. (R. 121–129.) On appeal, the Circuit Court of Appeals held that the District Court had correctly interpreted the statute and that its judgment on the merits was sustained by the evidence. (R. 226–239.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that payment made pursuant to a certificate issued under Section 212 of the Transportation Act, 1920, is final and binding upon the United States.

2. In holding that the finding of the District Court that the Commission's certificate of March 1, 1921, was not made through mistake or without authority of law was sustained by the evidence.

SUMMARY OF ARGUMENT

I. The respondent in this case has received an overpayment of public funds. This Court has established in numerous decisions that overpayments made by officers of the United States may be recovered by the United States in an action at law, whether such overpayments were made under a mistake of law or fact or not. These cases allowing the United States to recover an overpayment are not based on fraud, deceit, duress, or the like. They hold that when an overpayment is made by government officers, the Government has a right to recover, regardless of the type or character of the officers' error or mistake. In this case it is admitted that the respondent has received more than the Commission has ultimately determined to be due. This overpayment, we submit, may be recovered by the United States without regard to the circumstances under which it arose.

II. Certificates issued under Section 212 of the Transportation Act, 1920, are not final and binding on the United States so as to bar it from recovering from carriers money paid out of the Treasury pursuant to such certificates in excess of the amount finally ascertained by the Interstate Commerce Commission to be due such carriers under Section 209 of that Act. Section 209 (g) contains the only provision in the Act for final determination of guaranty claims. Even if Congress did intend determinations under Section 212 to be something more than mere estimates, it does not follow therefrom that the United States was to be denied the right to recover if partial payment certificates were nevertheless issued for an amount in excess of that finally ascertained to be due. No reason of policy existed for making partial payments under Section 212 final. On the other hand, Section 212 was enacted to give the carrier speedy relief from a distressing financial situation, and hasty and tentative determinations were necessary to give it the effect intended. It is unsound to contend that the Commission, after issuing partial-payment certificates under Section 212, retained jurisdiction for the purpose of increasing but not decreasing the total amount of the guaranty. Statutes granting privileges or relinquishing rights must be construed favorably to the Government.

III. The Commission issued its partial payment certificate of March 1, 1921, through mistake or

without authority of law. Even if Congress intended that payments made pursuant to certificates issued under Section 212 should be based upon a definite ascertainment which should be final and binding upon the United States, it does not follow that in this case the United States is not entitled to recover because the record shows that no definite ascertainment was made. During the year 1920, the Commission certified three advances to respondent pursuant to Section 209 (h), Transportation Act, 1920. Subsequently, respondent filed its guaranty claim and a return, which was incomplete and was revised and augmented by respondent from time to time in the following several years. Respondent requested, on the basis of this return a certificate for $6,000,000 to be used for credit purposes. The Commission's Bureau of Finance, after a cursory examination of the return, estimated that the Commission could safely issue the requested certificate. Three days after the issuance thereof Congress enacted the Winslow bill containing Section 212, which authorized the Commission to certify any amounts definitely ascertained by it to be due as partial payments to carriers. Two days after the enactment of the Winslow bill, respondent advised the Commission that it wanted immediately a certificate pursuant to Section 212. Without any further examination of respondent's return (R. 49–50) the Bureau of Finance recommended in favor of such a certificate and the same was issued on the following day. At the time the

certificate pursuant to Section 212 was issued, the Commission had not determined upon many of the accounting principles to be followed in making a final ascertainment, and some of these principles were not determined upon for many months thereafter. Delay in issuing the certificate until the determination of these principles was completed would have defeated the purpose of the Act and the desire of respondent for immediate advance of money. The certificate under Section 212 was based purely upon an estimate and was not a definite ascertainment within the meaning of Section 212. A certificate by a governmental body issued in excess of authority is invalid regardless of what it purports. Public funds paid by mistake or without authority of law may be recovered. The payment pursuant to the certificate was unlawful.

ARGUMENT

I

THE UNITED STATES MAY ALWAYS RECOVER AN OVERPAYMENT MADE BY ITS OFFICERS

The respondent in this case has received an overpayment of public funds. It has admitted that it has received $12,500,000 from the United States (R. 16, 28), and that the Interstate Commerce Commission has finally certified that $11,170,214.02 was the amount necessary to make good to the respondent the guaranty provided by Section 209. (R. 17, 29.) The function imposed upon the Commission by Section 209 is purely administrative, and in no sense judicial. Its task is to determine the

amount required to make good the guaranty, a task which this Court said, in *Great Northern Ry.* v. *United States,* 277 U. S. 172, 180, might appropriately have been performed for the Treasury by its Comptroller or auditors, or by other trusted officials. The decisions of this Court leave no doubt that if the task had been performed by such officials the overpayment would be recoverable by the United States. The principle of these decisions has like application to the overpayments here involved.

In *Wisconsin Central Railroad Co.* v. *United States,* 164 U. S. 190, a railroad sued in the Court of Claims for a balance alleged to be due as compensation for carrying mails. The United States counterclaimed for certain sums alleged to have been previously paid to the railroad in excess of the Postmaster General's authority, for the reason that land grant railroads were required by law to carry mail at eighty per cent of the full rate, and this railroad, though within that class, had received certain payments at the full rate. The Court of Claims allowed the counterclaim and the judgment was affirmed by this Court. A similar question was involved in *Grand Trunk Western Railway Co.* v. *United States,* 252 U. S. 112. This Court allowed the recovery of an overpayment, saying (p. 121):

> It matters not how long a time elapsed before the error in making the overpayment was discovered or how long the attempt to recover it was deferred. The statute of limitations does not ordinarily run against the

United States and would not present a bar to a suit for the amount.

United States v. *Burchard,* 125 U. S. 176, is another decision in which this Court allowed the United States to recover an overpayment of public funds.[2]

This principle has frequently been applied to allow the United States to recover erroneous refunds of taxes. Although the Commissioner of Internal Revenue has at one time determined that a tax has been overpaid, and as a consequence of this determination, money has been refunded to the taxpayer, the United States is not precluded from recovering the amount of the refund if it later appears that the Commissioner's first determination was erroneous. *Burnet* v. *Porter,* 283 U. S. 230.[3]

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[2] See also *Sutton* v. *United States*, 256 U. S. 575; *Talcott* v. *United States*, 23 F. (2d) 897 (C. C. A. 9th), certiorari denied, 277 U. S. 604; *United States* v. *Sutton Chemical Co.*, 11 F. (2d) 24 (C. C. A. 4th); *United States* v. *Kerr*, 196 Fed. 503 (C. C. Ore.); *United States* v. *Gillmore*, 189 Fed. 761 (C. C. S. D. N. Y.); *United States* v. *Dempsey*, 104 Fed. 197 (C. C. Mont.); *United States* v. *Saunders*, 79 Fed. 407 (C. C. A. 1st).

[3] Other cases to the same effect are *Baumgartner* v. *Commissioner*, 51 F. (2d) 472 (C. C. A. 9th), certiorari denied, 284 U. S. 674; *Champ Spring Co.* v. *United States*, 47 F. (2d) 1 (C. C. A. 8th), certiorari denied, 283 U. S. 852; *Oak Worsted Mills* v. *United States*, 68 C. Cls. 539, 546–547, certiorari denied as to this point, 281 U. S. 717; *McIlhenny* v. *Commissioner*, 39 F. (2d) 356 (C. C. A. 3d); *Austin Company* v. *Commissioner*, 35 F. (2d) 910 (C. C. A. 6th), certiorari denied, 281 U. S. 735; *United States* v. *Bartron*, 35 F. (2d) 765 (D. S. D.); *Talcott* v. *United States*, 23 F. (2d) 897 (C. C. A. 9th), certiorari denied, 277 U. S. 604;

The analogy between these cases allowing recovery of erroneous tax refunds and the present case is perfect. In each situation there is an administrative determination followed by a payment of public money, and thereafter another administrative determination that the payment made was excessive. In the tax cases it is uniformly held that the first administrative determination is not final and conclusive and that it does not bar the United States from recovering so much of the payment as was in fact erroneous. Similarly, here, the administrative tribunal which was given final authority in the matter has determined the respondent has received an overpayment. Such an overpayment may be recovered by the United States.

The cases allowing the United States to recover an overpayment made by its officers are not based upon fraud, deceit, duress, or the like. They hold that when an overpayment is made by Government officers, the Government has a right to recover, regardless of the type or character of the officers' error or mistake. Since it is admitted in this case that the respondent has received more than the Commission ultimately determined to be due, we submit that it is clear that there has been an overpayment and that, under the decisions of this Court, that overpayment may be recovered by the United States without regard to the circumstances under which it was received.

United States v. *Standard Spring Mfg. Co.*, 23 F. (2d) 495 (D. Minn.); *United States* v. *Tuthill Spring Co.*, 55 F. (2d) 415 (N. D. Ill.).

II

CERTIFICATIONS UNDER SECTION 212 OF THE TRANSPORTATION ACT, 1920, ARE NOT FINAL AND BINDING UPON THE UNITED STATES

Respondent has not set up any defense in the nature of estoppel. So far as appears it has not changed its position in reliance upon any understanding that the payment to it under Section 212 was a *pro tanto* final settlement. It necessarily admits that the Commission, which under the statute was required to determine the amount of the guaranty, has found that respondent has received from the United States more than the amount of the guaranty payable to it under Section 209. It rests upon the technical defense that Section 212 bars recovery of the overpayment.

That partial payment certificates issued under authority of Section 212 were not intended to be final *pro tanto* is indicated by the language of that section. In authorizing certifications of amounts definitely ascertained to be due, the section says the Commission "may thereafter in the same manner make further certificates, until the whole amount due has been certified," such process to be followed by the Commission "if not at the time able finally to determine the whole amount due." There is no express provision or implication that mistakes in the issuance of certificates under Section 212 may not be corrected later and overpayments resulting therefrom recovered by the United States.

Furthermore, Section 212 authorizes a "partial payment." A payment which is in excess of the total obligation can not be said to be a "partial payment" thereof.

Importance was attached by the Circuit Court of Appeals to extracts from Congressional debates and statements by members of committees in charge of the Winslow bill, which tend to support the view that Congress intended that the Commission should make definite ascertainments of partial amounts, and that certificates were not to be issued on tentative determinations. But even if Congress did intend that determinations under Section 212 were to be something more than mere estimates for the purpose of making advances on account, it does not follow that Congress intended to deny to the United States the right to recover if partial-payment certificates were nevertheless issued for an amount in excess of that finally ascertained to be due under Section 209 (g).

The Circuit Court of Appeals, however, appears to have regarded Section 212 as authorizing certificates having the same force and effect as certificates under Section 209 (g). While the latter section does not expressly prohibit subsequent corrections by the Commission of certificates authorized thereunder, such a prohibition may perhaps be implied, to the end that finality may be ultimately given to the Commission's determinations. But no such reason of policy exists for imparting finality to the determinations of the Commission in passing upon

applications for partial payments, which presuppose further consideration and determination. In the enactment of Section 209 (g) Congress expressed an entirely different purpose from that in the enactment of Section 212. The former was to provide an ultimate determination of the amount of the guaranty, which would involve much time and labor and would fix property rights of carriers. The latter was an emergency measure, designed to afford partial and speedy relief to the carriers, many of which needed funds immediately in order to continue operations. *Northern Pacific Ry. Co.* v. *Interstate Commerce Commission*, 23 F. (2d) 221 (App. D. C.), certiorari denied, 275 U. S. 572. See also *Texas and Pacific Ry. Co.* v. *United States*, No. 634, decided by this Court May 16, 1932; *United States* v. *Guaranty Trust Company*, 280 U. S. 478, 484.

It is submitted that the construction of Section 212 adopted by the courts below is inconsistent with the avowed purpose of Congress in enacting this legislation to give the railroads relief in the credit crisis then confronting them by making immediately available to them a part of the guaranty which they would ultimately receive from the Government.[4] This purpose presupposed prompt and necessarily tentative decisions by the Commission.

[4] See statement of Chairman of House Committee on Interstate Commerce when reporting the bill which became the Act of February 26, 1921 (Cong. Rec., vol. 60, pt. 3, p. 2737), and the House Committee's report on the bill (H. Rep. No. 1243, 66th Cong., 3rd Sess., p. 3).

But it was also the duty of the Commission to guard against overpayments of the guaranty. It could not, consistently with this duty, authorize the partial payments contemplated by Congress if, when so doing, it was finally concluding the rights of the United States and barring the recovery of any payments later found to be excessive. If the Commission had acted on the view adopted by the courts below, the real purpose of Congress would have been frustrated, since of necessity all payments would have been withheld until the ultimate right to retain them had been finally determined.

That the Commission regarded payments under Section 212 as tentative and for the purpose of meeting an emergency is further indicated by the fact that similar overpayments were made to a large number of other carriers. Many of these overpayments were made immediately after the passage of the Winslow bill and within a few weeks of the payment to the respondent. The overpayments in these other cases show a contemporaneous construction by the Commission of its functions under Section 212; a construction which was accepted without question by a number of the carriers who refunded without protest the amounts thus overpaid.[5]

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[5] In at least 28 cases the Commission, upon final determination of the guaranty, found a previous overpayment. (R. 187.) In 22 of the 28 cases the carrier refunded or promised to refund the overpayment. (R. 187.) Revised figures furnished by the Treasury Department on September 8, 1932, show that overpayments aggregated $3,779,719.59,

That Section 212 was intended to afford a form of relief inconsistent with any final and conclusive determination of the guaranty, is illustrated by the facts of this case. Two days after the section was enacted, respondent's president wrote the Commission (R. 138–139) urging it promptly to issue a certificate thereunder in lieu of, and in the same amount as, the prior certificate which had been issued under Section 209 (h) and which admittedly was subject to subsequent revision and correction.

We submit that it is a fair inference that when this request was addressed to the Commission, neither respondent nor the Commission regarded Section 212 as authorizing certificates which would finally conclude the rights of either party so as to preclude correction of errors incident to granting the prompt relief which respondent sought.

The Circuit Court of Appeals (R. 235–236) gave weight to the fact that Section 209 (h) made the payment of advances contingent upon the carrier's execution of a contract, secured as the Secretary of the Treasury might determine, to repay any advance received in excess of the guaranty, and that

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and, apart from the instant case, $2,449,933.61. Of this latter amount approximately $2,260,000, including interest, has been refunded to the United States. Many of the individual overpayments were substantial. Respondent received the largest single overpayment, but the second largest amounted to $1,320,241.73, or only about $9,500 less than that to respondent. At least 7 of the overpayments exceeded $100,000.

the House rejected an amendment which would have added this requirement to payment of certificates under Section 212. The proposed amendment was opposed on two grounds: (1) that it would interfere with the effectiveness of the relief to carriers since many short lines could not furnish adequate security, and (2) that the Interstate Commerce Commissison was authorized to certify only those amounts which it had definitely ascertained were due. (Cong. Rec., vol. 60, pt. 3, pp. 2812–2814.)

It is submitted that rejection of the amendment under these circumstances does not show that Congress intended by Section 212 to bar the United States from recovering payments made thereunder if in excess of what was finally determined to be due. To construe Section 212 as barring the United States from recovery of excess payments would bring it into conflict with Section 209 (g) under which the amount of the guaranty was to be determined by the Commission and liquidated by the Secretary of the Treasury. Furthermore, the fact that Congress considered deposit of security unnecessary because the Commission was authorized to certify only those amounts which it had finally ascertained were due, does not indicate that Congress intended to bar recovery if overpayments should in fact occur notwithstanding the intention that they should not.

In the courts below, respondent urged that paragraph (b) of Section 212 supports its construction of the statute. That paragraph (*infra,* p. 35) pro-

vides that the Commission, in computing partial payment certificates, may include an estimate of the net effect of deferred credits and debits provided the interested carrier has agreed to the estimate. It also provides that any amount so agreed to shall be *prima facie but not conclusive* evidence of its correctness in final settlement. From this provision respondent draws the inference that all other items included in the computation of partial payment certificates were to be conclusive in final settlement. If any inference is permissable it is to the contrary, because the language of the last clause of paragraph (b) of Section 212 indicates that the partial settlement is not final and may be readjusted under Section 209 (g). Manifestly the procedure provided in Section 212 was intended to be subsidiary to the final settlement later to be reached under Section 209 (g).

There is no sound basis for contending that partial payment under Section 212 would exhaust the Commission's jurisdiction except for the purpose of increasing the total amount of the guaranty by the issuance of later certificates. From respondent's position it would result that the Government would be bound by certificates under Section 212 but the carriers would not. The theory is similar to that rejected by this Court in *Gordon* v. *United States*, 7 Wall. 188, 195, where it was said that "an arbitrament and award which concludes one party only is certainly an anomaly in the law." It is a familiar rule of construction that statutes granting

privileges or relinquishing rights must be construed favorably to the Government. *Caldwell* v. *United States,* 250 U. S. 14, 20; *Slidell* v. *Grandjean,* 111 U. S. 412, 437. It is submitted that the rule is applicable here. While the guaranty authorized by Section 209 is not a gift or subsidy, it is also not in fulfillment of any legal obligation, and, broadly speaking, it authorized a large payment of public funds without direct consideration therefor. See *Texas & Pacific Ry. Co.* v. *United States, supra.*

III

THE COMMISSION ISSUED ITS PARTIAL PAYMENT CERTIFICATE OF MARCH 1, 1921, THROUGH MISTAKE OR WITHOUT AUTHORITY OF LAW

Even if Congress had intended that payments made pursuant to certificates issued under Section 212 should be based upon a definite ascertainment which should be final and binding upon the United States, it does not follow that the United States is not entitled to recover. The record shows that no definite ascertainment was made. Section 212 authorizes the Commission, if not finally able to determine the whole amount due to a carrier under Section 209, to "make its certificate for any amount definitely ascertained by it to be due." A certificate which is not based upon a definite ascertainment is not a certificate within the authority of Section 212, and payment thereon is not payment authorized by law. The courts would probably hesi-

tate, in the absence of convincing evidence, to hold that the Commission had issued a certificate under Section 212 without the definite ascertainment required by law, but it is our contention that the Commission did not prior to March 1, 1921, definitely ascertain that an additional $6,000,000 was due respondent on account of the guaranty.

The evidence shows that in issuing the certificate which resulted in the overpayment the Commission merely estimated the amount certified for partial payment, and that there was no definite ascertainment, as required by Section 212.

During the year 1920, the Commission had certified three advances to respondent pursuant to Section 209 (h). (R. 19–22.) The information submitted by respondent in support of its applications for advances consisted principally of its income account for part of the guaranty period in connection with the comparative returns for the same months in the years 1918 and 1919 (R. 37), the actual financial results of respondent's operations for the preceding portion of the guaranty period and estimates of anticipated earnings for the remaining months of the guaranty period (R. 38, 39). The data submitted in the return was hastily examined by the Commission and was accepted as indicating what respondent might earn during the guaranty period as the basis for the Commission's estimate for the amount that might then be advanced. It is clear that the Commission did not

make a determination which could be characterized as final or definite. Indeed the testimony shows that before the Commission issued its certificate to respondent for a $6,000,000 partial payment under Section 212 on March 1, 1921, it made substantially the same perfunctory and cursory kind of examination of the data before it as it had made when passing upon applications for advances.

The Commission's only examination of respondent's data was prior to the enactment of Section 212. (*Supra*, pp. 4–8.) The accountant of the Bureau of Finance, who had charge of the examination, was instructed to make the same kind of examination as those made upon applications for advances, which required merely an estimate of the guaranty. (R. 46.) The examination was made with the understanding that the certificate required was to be used for credit purposes only and not for obtaining money from the United States. (R. 47.) The guaranty claim which respondent had filed on February 14, 1921 (R. 41), was accompanied by a return showing a greater volume of detailed information but was comparable and similar in character to that furnished in the earlier returns when respondent was asking for advances, in that it disclosed information with respect to the same accounts and the same items of revenue and expenses (R. 42). The information submitted with the claim filed on February 14, 1921, was not in fact final and complete, nor was it so regarded because

respondent's books had not been closed for the guaranty period and there were still numerous outstanding accounts subject to adjustment. (R. 42.) For this reason, respondent itself stated in the return that "the schedules following are, as near as can be determined at this time, a basis for settlement under Section 209, Transportation Act, 1920." (R. 42.) The data submitted with the claim was frequently revised and augmented from time to time as respondent's accounts for the guaranty period were finally adjusted up to and including as late a date as January 30, 1925. (R. 51–53.) Application for an additional $6,000,000 on the return of February 14, 1921, was made two days later (R. 136), and the Commission's credit certificate was issued nine days later. (R. 133.)

The Commission's accountant, who was in charge of the examination of the data, testified that his accountants proceeded in exactly the same manner as they had in examining applications for advances; that their result was a "pure and simple estimate"; that no part of it had "any intent of finality" (R. 47); and that at no time was the certificate issued March 1, 1921, regarded as a definite ascertainment (R. 93–94). Not only did the Commission regard its certificate of March 1, 1921, as of the same character as the previous advances, but respondent's own application made no reference to partial payment but stated that "we must obtain an *advance* on account of the Guaranty period."

(R. 136–137.) At the time the data were examined to determine whether a credit certificate, as requested on February 16, 1921, should be issued, Section 212 had not been enacted and there was no authority in law for making definite ascertainments of any amount less than the total ascertainment of the guaranty due under Section 209 (g). The accountants, therefore, had no reason to proceed along any different lines from those they had theretofore followed in examining applications for advances.

The Winslow bill, containing Section 212, was enacted as an amendment to the Transportation Act, 1920, on February 26, 1921. Two days later, respondent called the Commission's attention to the change in the law, and requested in lieu of the credit certificate a new certificate for $6,000,000 with which it could obtain funds from the Treasury. (R. 138–139.) Upon the same day, without any further examination or consideration of respondent's return, the Bureau of Finance acted and recommended in favor of such a certificate. On the following day the certificate pursuant to which payment was made was issued. (R. 22, 49, 214–217.) Thus no determination of any kind, nor any investigation of the data submitted by respondent, was made after Section 212 was enacted. The Bureau of Finance, in reporting to the Commission previous to the enactment of Section 212, had characterized the conclusions reached as estimates. (R. 211–212.) When the law was changed and the re-

quest made for a partial payment pursuant to the new section, the Bureau formally revised its report to conform to the language of Section 212, eliminating the words "estimate" and "estimated." (R. 50, 215–217.) But the fact remained that their report was based upon an estimate and attempted no final determination.

In its computation of respondent's partial payment certificate, the Commission did not eliminate deferred items from the total of respondent's claim which at the end of the guaranty were a little over $1,000,000. (R. 66, 215–217.) Prior to issuing its certificate of March 1, 1921, no agreement was reached with respondent as to the net effect of deferred items. (R. 66, 215–217.) The inclusion of deferred items in the computation without such an agreement with the carrier was in violation of paragraph (b) of Section 212. We submit that on this ground alone the Commission's certificate was invalid.

On March 1, 1921, when the $6,000,000 certificate was issued, the Commission itself had not determined upon many of the accounting and other principles to be followed in making its final ascertainment. For example, it was not until July 12, 1921, that the Commission rendered its decision *In the Matter of Maintenance Expenses Under Section 209,* 70 I. C. C. 115, which prescribed the method to be followed in determining the amount of maintenance to be included in operating ex-

penses of carriers under Section 209. (R. 44.) Nor was it until August 15, 1923, that the Commission decided *In the Matter of Treatment of Salvage, Piece Work and Prices in Settlements Under Section 209,* 82 I. C. C. 678, which prescribed the method of arriving at factors to be used in ascertaining the difference in cost of material during the guaranty and the test periods. (R. 44.) That the determination of these principles was essential to a definite ascertainment of the total guaranty is indicated in the report of the full Commission (111 I. C. C. 318), which is in evidence as Government Exhibit 7. (R. 183.)

A certificate by a governmental body issued in excess of authority is invalid, regardless of what it purports. The certificate of March 1, 1921, was invalid because, as the foregoing shows, it was not based upon a definite ascertainment but merely upon a hasty computation made for other purposes. Recitals in the certificate can not cure such a mistake or create an estoppel as against excess of authority. True, different individuals exercise different standards of care in performing the duties required of them by law. But that is not the question here, since the evidence shows that no attempt was made to make a final ascertainment at all. The United States does not maintain that due care was not exercised in the performance of the Commission's duties under Section 212 in issuing the certificate of March 1, 1921, but rather that

those duties were not performed at all, and that since no ascertainment was in fact made, the certificate did not preclude the United States from recovering sums paid respondent pursuant thereto in excess of the amount finally ascertained by the Commission to be due.

CONCLUSION

The judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

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SEPTEMBER, 1932.

APPENDIX

Section 209 of the Transportation Act. 1920, c. 91, 41 Stat. 464, 465, 466 (U. S. C., Title 49, sec. 77), provides, in part:

> SEC. 209 (a). When used in this section—
>
> The term "carrier" means (1) a carrier by railroad or partly by railroad and partly by water, whose railroad or system of transportation is under Federal control at the time Federal control terminates, or which has heretofore engaged as a common carrier in general transportation and competed for traffic, or connected, with a railroad at any time under Federal control; * * *.
>
> The term "guaranty period" means the six months beginning March 1, 1920.
>
> The term "test period" means the three years ending June 30, 1917; * * *.
>
> * * * * *
>
> (b) This section shall not be applicable to any carrier which does not on or before March 15, 1920, file with the Commission a written statement that it accepts all the provisions of this section.
>
> (c) The United States hereby guarantees—
>
> (1) With respect to any carrier with which a contract (exclusive of so-called cooperative contracts or waivers) has been made fixing the amount of just compensation under the Federal Control Act, that the railway operating income of such carrier for the guaranty period as a whole shall not be

less than one-half the amount named in such contract as annual compensation, * * *.

* * * * *

(f) In computing railway operating income, or any deficit therein, for the guaranty period for the purposes of this section—

* * * * *

(3) There shall not be included in operating expenses, for maintenance of way and structures, or for maintenance of equipment, more than an amount fixed by the Commission. In fixing such amount the Commission shall so far as practicable apply the rule set forth in the proviso in paragraph (a) of section 5 of the "standard contract" between the United States and the carriers (whether or not such contract has been entered into with the carrier whose railway operating income is being computed);

* * * * *

(5) The Commission shall require the elimination and restatement of the operating expenses and revenues (other than for maintenance of way and structures, or maintenance of equipment) for the guaranty period, to the extent necessary to correct and exclude any disproportionate or unreasonable charge to such expenses or revenues for such period, or any charge to such expenses or revenues for such period which under a proper system of accounting is attributable to another period.

(g) The Commission shall, as soon as practicable after the expiration of the guaranty period, ascertain and certify to the Secretary of the Treasury the several amounts

necessary to make good the foregoing guaranty to each carrier. The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States, for the amount shown in such certificate as necessary to make good such guaranty. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated.

(h) Upon application of any carrier to the Commission, asking that during the guaranty period there may be advanced to it from time to time such sums, not in excess of the estimated amount necessary to make good the guaranty, as are necessary to enable it to meet its fixed charges and operating expenses, the Commission may certify to the Secretary of the Treasury the amount of, and times at which, such advances, if any, shall be made. The Secretary of the Treasury, on receipt of such certificate, is authorized and directed to make the advances in the amounts and at the times specified in the certificate, upon the execution by the carrier of a contract, secured in such manner as the Secretary may determine, that upon final determination of the amount of the guaranty provided for by this section such carrier will repay to the United States any amounts which it has received from such advances in excess of the guaranty, with interest at the rate of 6 per centum per annum from the time such excess was paid. There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, a sum sufficient to enable the Secretary of the

Treasury to make the advances referred to in this subdivision.

* * * * *

The Act of February 26, 1921, c. 72, 41 Stat. 1145 (U. S. C., Title 49, sec. 79), provides:

That the Transportation Act, 1920, is hereby amended by adding after section 211 a new section to read as follows:

"SEC. 212. (a) In making certifications under section 204 or section 209, the Commission, if not at the time able finally to determine the whole amount due under such section to a carrier or the American Railway Express Company, may make its certificate for any amount definitely ascertained by it to be due, and may thereafter in the same manner make further certificates, until the whole amount due has been certified. The authority of and direction to the Secretary of the Treasury under such sections to draw warrants is hereby made applicable to each such certificate. Warrants drawn pursuant to this section, whether in partial payment or in final payment, shall be paid: (1) If for a payment in respect to reimbursement of a carrier for a deficit during the period of Federal control, out of the appropriation made by section 204; (2) if for a payment in respect to the guaranty to a carrier other than the American Railway Express Company, out of the appropriation made by subdivision (g) of section 209; and (3) if for a payment in respect to the guaranty to the American Railway Express Company, out of the appropriation made by the fifth paragraph of subdivision (i) of section 209.

"(b) In ascertaining the several amounts payable under either of such sections, the Commission is authorized, in the case of deferred debits and credits which can not at the time be definitely de-

termined, to make, whenever in its judgment practicable, a reasonable estimate of the net effect of any such items, and, when agreed to by the carrier or express company, to use such estimate as a definitely ascertained amount in certifying amounts payable under either of such sections, and such estimates so agreed to shall be prima facie but not conclusive evidence of their correctness in amount in final settlement.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 96

THE UNITED STATES OF AMERICA, PETITIONER,

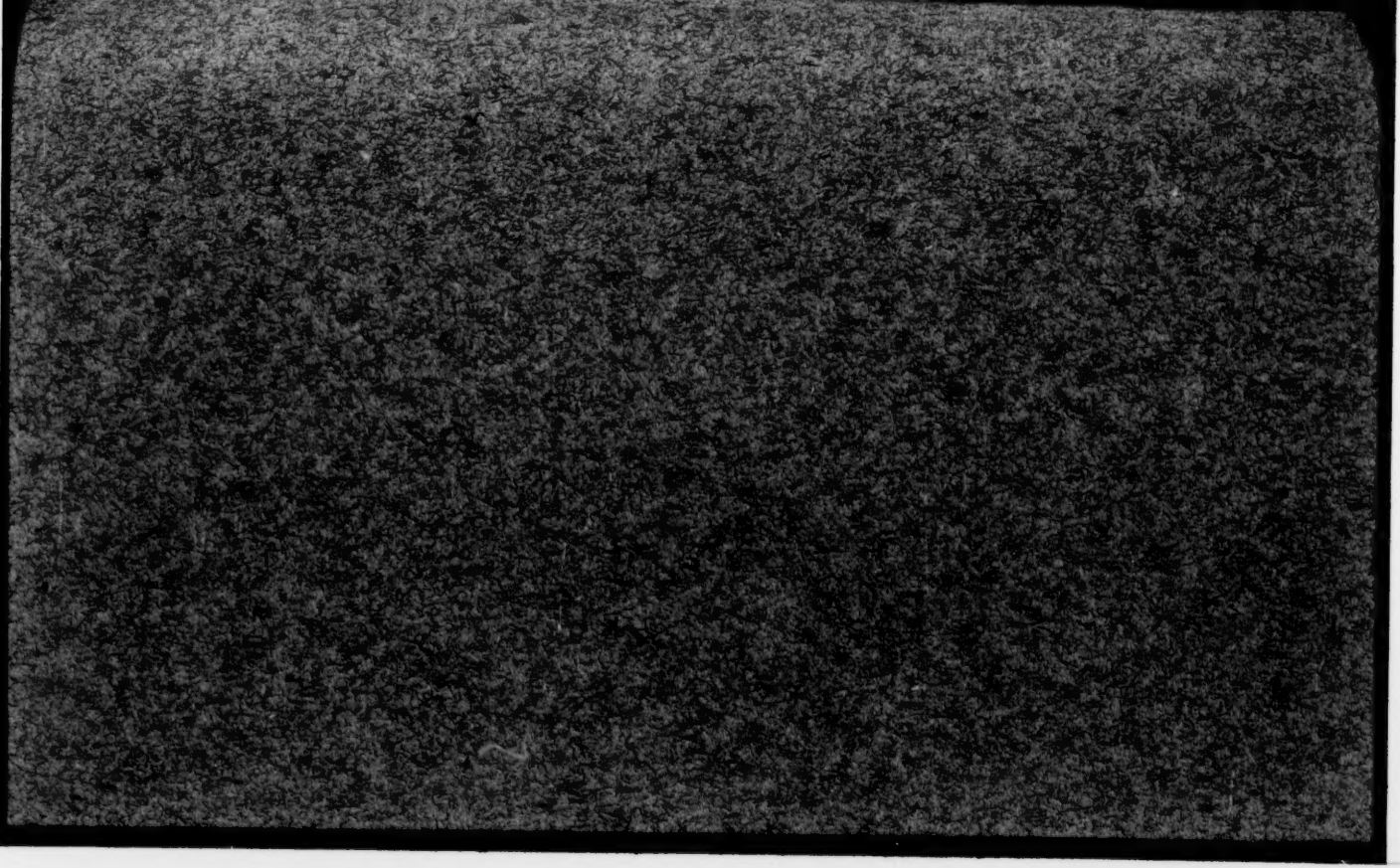
v.

GREAT NORTHERN RAILWAY COMPANY.

BRIEF OF RESPONDENT, GREAT NORTHERN RAILWAY COMPANY, OPPOSING GRANTING OF PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

F. G. DORETY,
R. J. HAGMAN,
W. W. MILLAN,
R. E. L. SMITH,
Attorneys for Respondent.

Dated at Washington, D. C., May 21, 1932.



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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No.

THE UNITED STATES OF AMERICA, PETITIONER,

v.

GREAT NORTHERN RAILWAY COMPANY.

BRIEF OF RESPONDENT, GREAT NORTHERN RAILWAY COMPANY, OPPOSING GRANTING OF PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Grounds for Opposing the Writ.

The second question presented in the Government's petition is the question whether the Commission did in fact make a definite ascertainment of the amount paid to respondent. The Government urges that while the

Commission's own certificate declares that it did make a definite ascertainment, the testimony of one of its employees contradicts this and offers "convincing evidence" that what the Commission made was a mere estimate, and not a definite ascertainment.

If this were the only question presented here, we believe that this Court would be slow to grant certiorari for the sole purpose of reexamining the evidence after two lower courts have passed upon its sufficiency. The contention that the Commission's own solemn recital of fact in its formal certificate stands for naught when contradicted by the testimony of a subordinate employee is an unusual one. But when that recital is supported by as much documentary and oral evidence as we have produced here and when two courts have found that the evidence sustains it, there would be little justification for asking this Court to reexamine the record upon that question alone.

The first and only other question presented is one of construction of the statute. If there were a serious question of statutory construction as to whether certificates and payments under Section 212 of the Transportation Act were intended to be binding upon the Government, and if courts of appeals in two different jurisdictions had considered this question fully and reached opposite conclusions, this Court might well be asked to determine the question by writ of certiorari. However, we believe we can convince the Court that this question of statutory construction is not a seriously debatable or reasonably doubtful one; that this was conceded by the Government in the court below; that

the seemingly contrary statement made by the Court of Appeals of the District of Columbia in the *Northern Pacific case* was not necessary to the determination of that case but was rather in the nature of *dictum*, and was made without full consideration, and without any knowledge of the legislative history of the statute and on a different state of facts. We hope to convince this Court that this question of statutory construction and this apparent conflict of decisions are now being resurrected by the Government without any reasonable hope of prevailing upon that issue and solely for the purpose of creating an apparent justification for a writ of certiorari, and thereby obtaining an otherwise unobtainable review of the question of fact.

A decision of a lower court, made in accordance with an admission of a party in that court, should not be assigned as an error by that party in the upper court, and the upper court should not be asked to take its time to review a question which the party conceded away in the court below.

Petitioner points out that large sums have been refunded to the Government by other carriers on account of alleged overpayments under Section 212 and argues that if the decision below is not reviewed by this Court, numerous suits will undoubtedly be brought against the United States to recover the amounts so refunded. We submit that there is no reasonable probability of any such suits because there would be no possibility of recovery therein. Amounts voluntarily refunded by carriers without protest could not be recovered on the mere ground that the carrier making the payment

erroneously supposed itself legally liable therefor. *U. S.* v. *Edmunston,* 181 U. S. 500.

Moreover, where the Government has received money under an assertion of right, there is no implied contract to return it. Consequently the Court of Claims would have no jurisdiction of an action, and the action would not lie in any other court. *Temple* v. *U. S.,* 248 U. S. 121.

Petitioner argues that its second question, as to what constitutes a valid determination by the Commission under Section 212, may arise in other litigation, as indicated by the similarity between the facts of this case and those of the *Northern Pacific case.* However, the *Northern Pacific case* is finally disposed of and not open to further litigation and petitioner fails to suggest any other case in which a similar question might be litigated.

The delay in this case might be fraught with most serious consequences to the respondent. While the record in the present case does not show it, the record in *Great Northern Railway Company* v. *United States,* 277 U. S. 172, will show that we have upon deposit with the Secretary of the Treasury, as security for the payment of any judgment which the Government may recover, approximately $2,000,000 worth of Liberty Bonds which can be withdrawn only upon final decision of this action in our favor. Our public reports to the Interstate Commerce Commission will show that the further retention of this $2,000,000 might easily change our position from one of solvency to one of default in our interest obligations during the present year. While this would be no ground for denying the writ where

reasonably doubtful questions are involved, we submit it in the hope that this Court will give very particular attention to the question whether a reasonably debatable question is presented, before granting the writ.

ARGUMENT.

The Finality of a Certificate for Partial Payment Under Section 212.

In the "Reply Brief for the United States" filed in the Circuit Court of Appeals, the Government conceded on page 3 that "apparently Congress intended the Government to be bound by advances under Section 212, assuming, of course, that the Commission had in truth and in fact made a definite ascertainment required as a prerequisite to such payment." This was also conceded upon oral argument in the court below. The effect of this concession is to admit that the contrary holding by the Court of Appeals of the District, in the *Northern Pacific case* was erroneous. It is, therefore, surprising to find petitioner now renewing its original contention that the Government was not to be bound by these partial certificates, and that there is a serious conflict of decisions in two different jurisdictions which requires settlement by this Court.

That the partial certificates were intended to be binding *pro tanto* is indicated by the following considerations:

(1) The *wording* is similar to that of Section 209 (g), which authorizes the final settlement, and which the Government concedes would be binding. Section 209 (g) says, "The Commission shall * * * *ascer-*

tain and certify * * * the several amounts necessary to make good the foregoing guaranty * * *". Section 212 says, "The Commission, if not at the time able to determine the whole amount due * * *, may make its certificate for any amount definitely *ascertained* by it to be due * * *". Both sections use the word "ascertain", but Section 212 adds the word "definitely", so that the wording of Section 212 is even stronger than the wording of Section 209 (g), which admittedly provides for a determination that shall be binding.

(2) Section 212 contains two paragraphs. Paragraph (b) covers "deferred debits and credits" such as unsettled damage claims, while paragraph (a) covers all other items. Paragraph (b) permits a reasonable estimate of deferred debits and credits to be used as a definitely ascertained amount, but provides that such estimates "shall be *prima facie* but not conclusive evidence of their correctness in amount in final settlement". There is no such provision as to items other than deferred debits and credits which are covered by paragraph (a). If all items certified under Section 212 were to be merely *prima facie* but not conclusively correct, why enact a special provision to that effect as to one class of items only? In this sentence, Congress had apt language for the purpose of making the entire certificate *prima facie* but not conclusive, and it rejected that language except as to deferred debit and credit items. *Expressio unius exclusio alterius.*

In answer to this argument, the Government brief

says on page 17, "The explanation of the provision is that Congress was providing for something in the nature of a settlement as to deferred items, and, without an express contrary declaration in the statute, this settlement might have been regarded as conclusive". This is exactly the argument which we make as to paragraph (a). "Without the express contrary declaration" in paragraph (a), a settlement thereunder must be regarded as conclusive, especially when such a contrary declaration is included in paragraph (b) but omitted in paragraph (a).

This reasoning is strengthened by the legislative history of paragraph (b). As this paragraph was introduced, it provided that the Commission's "reasonable estimate" of the net effect of deferred debit and credit items, when agreed to by the carrier could be used as a definitely ascertained amount, and that such estimate so agreed to "shall be binding in final settlement". Mr. Dewalt offered an amendment striking out the word "binding" in the last line and inserting the words "*prima facie* but not conclusive evidence of their correctness in amount". This amendment was debated on pages 2815 and 2816 of Congressional Record, Volume 60, Part 3, and was adopted by a vote of 116 ayes, and 95 noes. Thus Congress drew a distinction between deferred debit and credit items mentioned in paragraph (b) which in the nature of things could not be definitely ascertained, and all other items, covered by paragraph (a), which could be definitely ascertained. The deferred debits and credits were made "*prima facie* but not conclusive" while the defi-

nite ascertainment of all other items, under paragraph (a), was left conclusive and binding.

This becomes all the more significant when we find on page 2812 of the Congressional Record a similar attempted amendment of paragraph (a) which was voted down. In other words, as originally introduced, both paragraphs were to be binding. Separate amendments were proposed as to each paragraph, the effect of which would be to make the certificate subject to correction and refund. The amendment was voted down in the case of paragraph (a) and adopted in the case of paragraph (b).

(3) If Congress had intended to provide for a mere advance on account, subject to refund, it had language apt for that purpose before it in Section 209 (h), which had provided for advances if made during Federal Control. But it rejected the word "advance" and provided for a "payment", and it rejected the express provision for refund of excess if any, which had been carried in Section 209 (h).

(4) Even if the language of the statute left any possible ambiguity, the reports of the Congressional Committee and the statements by those in charge of the measure remove all doubt. During the debates, those opposing the measure repeatedly objected to the bill on the ground that certificates issued under its provisions would be conclusive, and the majority members of the Committee who were in charge of the bill replied that this was exactly the result intended; that they proposed to make the partial payment as binding for the amount involved as the final payment would be. We will quote here some short examples of this.

In Volume 60, Part 3 of the Congressional Record, on page 2739, Mr. Sims, a minority member, said:

> "This bill provides no protection to the Government in case of excess payments on certificates. It provides that the Interstate Commerce Commission's certificates must be paid in full and no return whatever to the Government is provided for such excessive payment."

On page 2813, Mr. Barkley, a minority member of the Committee, said:

> "But suppose it turns out afterwards that there is a mistake, and suppose that the railroad has put something over the Interstate Commerce Commission in arriving at the estimate. Then, under the language of this bill, that estimate which has been arrived at must be *final settlement as to that item,* and the Government has no recourse to offset that claim against another claim that may be adjusted in the future". (Italics ours.)

A little further down, Mr. Barkley says:

> "But if you leave the language like it is, you have this situation: every road will insist upon settling each one of these items at a time, and when one of them has been settled, the Government is bound by that settlement."

The foregoing quotations are from remarks by members of the opposition who pointed out very clearly that certificates issued under the proposed bill would be binding upon the Government. That this was fully

understood by the majority members in charge of the bill and that it was the exact result intended to be accomplished appears from the following quotations:

Mr. Denison, page 2813, said:

> "The Interstate Commerce Commission is the tribunal which we have entrusted with the authority to make these final settlements, and if we can depend upon them to protect the interests of the Treasury in making final settlements, it seems to me we can very well do so in making partial settlements.
>
> Mr. Barkley: But the Interstate Commerce Commission is liable to make mistakes as well as anybody else, and these accounts will be audited by individuals in the Interstate Commerce Commission. Does the gentleman think that the Government should be protected if it should occur that a mistake was made?
>
> Mr. Denison: We have got to reach settlements some time. I was informed this morning that the accounting department of the Interstate Commerce Commission is the finest accounting institution of its kind in the United States if not in the world, and if we cannot depend upon it to safeguard the interests of the Treasury in making these settlements, then we ought to endeavor to provide some tribunal upon whom we can depend."

The following appears on page 2803:

> "Mr. Hardy (of Texas): Does not subsection (b) foreclose the Government in any error forever thereafter?
>
> Mr. Barkley: That is my understanding."

Mr. Dempsey said, page 2809:

> "Now, the gentleman from Tennessee (Mr. Sims) makes two objections. First he assumes that the Interstate Commerce Commission is to make some fatal error and he wants to defer that judgment. Is the question to be referred to some other body? Is it to be referred to the Supreme Court? Why, if it is to be determined anyway in the end by the Interstate Commerce Commission—you have the same Commission, you have the same facts, and is the gentleman assuming that on the same state of facts, the same body will give an erroneous judgment at one time and a correct judgment at another * * *."

The following appears on page 2809:

> "Mr. Reavis: * * * If we pay more under the estimate than we owe and have agreed to what has the Interstate Commerce Commission to do with it?
>
> Mr. Dempsey: Why, the Interstate Commerce Commission issues a certificate upon the facts, and its decision is made upon all of the data obtainable.
>
> Mr. Reavis: But if we pay more than is due?
>
> Mr. Dempsey: We are just as likely to be right now as at any time in the future."

Mr. Winslow said, page 2812:

> "Under the provisions of the Transportation Act, the amount arrived at and which could be put forward as an advance was the estimated amount, and for that reason of estimate, in order to protect the Government, the conditions of the bond or security to cover are provided in the law.

> Now, in this instance, we have another situation. Whatever amounts will be paid under the Bill before us will rest upon amounts which have been carefully canvassed, and which have been worked out to the satisfaction both of the debits and credits. There is a very different situation indeed."

On page 2802 occurs the following:

> "Mr. Montague: As I understand it, there is no bond required if there were only one final payment.
>
> Mr. Merrit: None.
>
> Mr. Montague: And you simply ask that the same rule apply here?
>
> Mr. Merrit: Certainly."

If it be asserted that these were expressions by individual members of Congress only, even though majority members of the Committee in charge of the bill, and that they do not necessarily reflect the opinion of Congress as a whole, we point to the amendment proposed by Mr. Barkley. On page 2812 appears the following:

> "Mr. Barkley: Mr. Chairman, I offer an amendment. * * * At the end of line one, page 2, insert: 'Before making such payment or drawing such warrant, unless it be upon a final settlement, the Secretary of the Treasury shall require the carrier to execute a contract on such security as the Secretary of the Treasury may determine, that upon final determination of the amount of the guaranty under Sections 204 and 209, such carrier will repay to the United States any amounts which it has received from such partial payment in excess of

> the guaranty with interest at the rate of 6% per annum from the time such excess was paid."

On page 2815, the following action on this amendment appears:

> "The question was taken; and on a division (demanded by Mr. Barkley) there were—ayes 65, noes 115."

It thus appears that Congress not only rejected the apt language in Section 209 (h) providing for a refund of excess payments, and rejected in paragraph (a) the apt language which it inserted by amendment in paragraph (b), providing that the certificates should be *prima facie* but not conclusive evidence of their correctness as to deferred items only, but it deliberately and specifically rejected a proposed amendment to Section 212 (a), which would have made any excess in the partial payment certificate, over the amount of the final certificate, recoverable. The intent could be no clearer if Congress had expressly added a clause in Section 212 (a) reading, "and no excess in such partial payment over the amount of the final certificate shall be recoverable".

On page 16 of its brief, petitioner points out that the Barkley amendment was rejected partly on the supposition that there would be no overpayments, since the Commission was authorized to certify only those amounts which it had definitely ascertained were due, and petitioner argues that rejection of the amendment under these circumstances does not show that Congress construed Section 212 as barring the United States from recovering payments made thereunder. We sub-

mit that the contrary is true. The circumstance shows a clear intent by Congress that the Commission should certify only such amounts as it could feel definitely certain of and that after it had once satisfied itself of such amounts and had certified them, there should be no refund and no recovery. If any refund or recovery had been intended, the proposed amendment would have been adopted.

There also appears in the Congressional Record, 66th Congress, 3rd Session, pages 108 and 109, a letter from Chairman Clark of the Interstate Commerce Commission to Chairman Esch of the Committee on Interstate and Foreign Commerce of the House of Representatives, dated January 22, 1921, while Section 212 was pending, clearly advising the Congress that the Interstate Commerce Commission would understand the bill as authorizing it to make definite ascertainments and definite payments. Chairman Clark said:

> "Paragraph (a) of Section 212 very definitely authorizes certificates in partial payment and payment of such certificates. It will be noted that such certificates are by the terms of this paragraph to be 'for any amount definitely ascertained by it (the Commission) to be due'. I think there is no misunderstanding of our conception of our duties under it, which is that a partial payment certificate would not be made for any amount in excess of an amount 'definitely ascertained' by us to be due the carrier."

On page 14 of brief for petitioner, the Government argues that in authorizing "*partial* payment", Con-

gress necessarily implied that any excess should be refunded, since any payment in excess of the total obligation cannot be a partial payment. What Section 212 (a) authorizes is not a "partial payment" but "any amount definitely ascertained by it to be due". If the amount were to be subject to refund, the proper term to use would be the word "advance" which was used in Section 209 (h), or the word "loan" and not "payment", whether partial or otherwise. The word "payment" imports finality.

On the same page, petitioner argues that the making of a partial certificate presupposed that further consideration would be given in the making of a final certificate, and, therefore, negatived finality in the partial certificate. But clearly Congress had the constitutional power to declare that a payment, then regarded as only partial, should nevertheless become vested in the payee without liability for refund, no matter what the final conclusion might be. Notwithstanding the fact that the payment, then regarded as only partial, was to be conclusively vested in the payee, it would still be necessary to complete the final determination, in order to determine whether any additional amounts were due. Whether the partial certificate were conclusively or only *prima facie* correct there must still be provision for a final determination. The fact that such final determination is provided for, therefore, throws no light whatever upon the question whether the partial certificate was intended to have conclusive or only *prima facie* weight.

On page 15 of petitioner's brief it is argued that the purpose of Section 212 was to give prompt relief,

and that if the partial certificates were to be made with sufficient exactness to be binding upon the Government, they could not be rendered promptly. This last statement ignores the fact that Congress had been specifically advised that the Commission was already prepared to make definite ascertainments, and that these would not involve delay. On page 2738 of the Congressional Record, Mr. Cooper had quoted the preceding annual report of the Commission, referring to "the immediate payment to some of these carriers of the amounts or parts of amounts *which we can now determine to be certainly due them,* under the Guaranty provisions of the Transportation Act, 1920". (Italics ours.) And Chairman Clark of the Interstate Commerce Commission had advised the Congressional Committee in the letter above quoted, that "a partial payment certificate would not be made for any amount in excess of an amount 'definitely ascertained' by us to be due the carrier".

When Section 212 was enacted, the Commission had been studying the formulæ and methods of determining payment for a year and had had as many as 40 men employed in this work (R. 55, 62). It had had the advantage of two or three years' previous experience of the Director General in determining the same questions (R. 63). On October 18, 1920, more than 4 months before Section 212 was passed, the Commission had issued its very elaborate order and questionnaire calling upon the carriers for the information necessary to conclude final settlements (R. 143). On January 29, 1921, more than a month before Section 212 was enacted, it had actually concluded a final

settlement under Section 209 (g) with the Norfolk Southern Railway, which is conceded to have been a definite and final ascertainment (65 I. C. C. 798, R. 114-116).

In *Continental Tie and Lumber Company* v. *United States,* No. 560, decided May 16, 1932, and not yet reported, this Court said:

> "But it is not clear that if the taxpayer had acted promptly an award could not have been made during 1920, or at least the principles upon which the Commission would adjust the railway's accounts to reflect true income have been settled during that year sufficiently to enable the railway to ascertain with reasonable accuracy the amount of the probable award. The reports of the Interstate Commerce Commission show that it was possible for a carrier whose claim arose under section 209 to obtain a final award early in 1921, prior to the time for preparing its income tax return. (Note No. 3.)

We submit that there is no foundation in the record for petitioner's argument that a requirement of conclusiveness in the partial certificates would have prevented prompt action. All of the information before Congress was to the contrary.

We submit that the Government has presented no argument entitled to serious consideration upon the question of statutory construction and that in view of the wording of the statute and the legislative history of the Act, the question is not a seriously debatable one. This conclusion is fortified by the fact that the Government was forced to admit it in its reply brief

in the court below. In view of all this, we feel justified in taking the position that the question is resurrected here not with any reasonable hope of securing a favorable decision from this Court upon that question, but solely for the purpose of importing the sort of an issue which might justify certiorari.

The seemingly contrary decision of the Court of Appeals of the District of Columbia in *Northern Pacific Railway Co.* v. *Interstate Commerce Commission*, 23 F. (2nd) 221, was made upon a different state of facts and without knowledge of the legislative history of the Act and the statement regarding the construction of the statute was not necessary to the decision. In that case the carrier filed in the Supreme Court of the District of Columbia, a petition for a common law writ of certiorari to review and set aside the Commission's *final* certificate issued under Section 209 (g). It appears from pages 13 to 30 of the brief for the Interstate Commerce Commission which was filed in this Court in opposition to a writ of certiorari, that the main contention of the Government in that case was that the carrier had pursued the wrong remedy in seeking to review the Commission's certificate by common law writ of certiorari from the Supreme Court of the District. Moreover, even though the previous partial certificate issued to that carrier under Section 212 were binding and conclusive, this would not necessarily invalidate the subsequent final certificate under Section 209 (g) or warrant the court in setting it aside on writ of certiorari. We submit that the district court in that case should simply have dismissed the application for a writ

because of lack of jurisdiction, without attempting to pass upon the conclusiveness of the previous partial certificate.

Moreover, that case presented facts different from those in the present case. On page 224, the court points out that the Northern Pacific in applying for its partial payment had agreed to refund any excess which might later be determined. There was no such agreement in our case.

But the most significant difference is that the debates in Congress upon Section 212 and the extracts from the Congressional Record which we have quoted above were not called to the attention of the District Court of Appeals. A decision by the District Court of Appeals made without knowledge of the legislative history of the Act cannot be regarded as evidence that the conflict is a serious one or that the question is really debatable.

We might add that there is an obvious fallacy and inconsistency in the reasoning of the court in the *Northern Pacific case.* It argues that Section 212 could not have contemplated a "definite ascertainment" because that would have necessarily involved delay and Congress desired prompt action; but at the same time the court says that Congress desired something more than the mere "estimate" provided for in Section 209 (h) because the carrier's bond or security was to be dispensed with. In other words, promptness was to be accomplished by avoiding a thorough investigation and security was to be accomplished by requiring one. We submit that if Congress desired certainty in order to justify the waiving of security, then it might as well

make the payment conclusive, as we contend that it did, for the delay would be incurred in any event. Moreover, the court was under a misapprehension in assuming that a definite ascertainment would have involved delay. As we have pointed out above, the Congressional Record shows that while Congress was considering the bill, it had been advised that the Commission was already prepared to make definite ascertainments without any substantial delay.

The District Court of Minnesota and the Circuit Court of Appeals of the Eighth Circuit are the only courts which have passed upon this question with full consideration and full knowledge of the legislative history, and with full knowledge of the facts disclosed by the Congressional Record. We submit that the decision of the Court of Appeals of the District in the *Northern Pacific case,* involving different facts, and being in the nature of a *dictum,* and made without knowledge of the facts disclosed by the Congressional Record, does not create a conflict which would warrant this Court in issuing a writ of certiorari.

We submit that in view of the clear wording of the statute, and the positively convincing legislative history, this cannot be regarded as a doubtful question, or as one that is subject to real conflict, and that, having conceded away this question in the court below, petitioner should not now revive it for the purpose of inducing their court to take jurisdiction.

The Evidence Does Not Show That the Commission Failed to Make a Definite Ascertainment.

The Commission itself certified that it had made a definite ascertainment. Two courts have heard or ex-

amined all of the evidence and have found not only that it fails to conclusively negative this certificate, but that the Commission did in fact make a definite ascertainment. Unless a writ of certiorari is otherwise justified, we submit that it should not be issued solely to review again the evidence on this question.

The amount of investigation and study necessary to make a definite ascertainment is not defined in the statute and is necessarily left largely to the discretion of the Commission. If it could be shown that the supposed ascertainment was made by drawing a number from a hat or by pure guess work, the certificate might be set aside, even though the facts were proven only by the testimony of a subordinate employee, if undisputed. This would amount to fraud.

But the evidence shows that the Commission had been studying this question for a year and had had a force of 40 men engaged exclusively upon it (R. 55, 62). They had had the assistance of a large amount of previous investigation by the Director General of Railroads and by committees of the Railway Executives Association (R. 63, 113, 116). They had issued three general orders giving instructions as to methods of calculation (R. 143, 174, 176). The last one, that of October 18, 1920, prescribed elaborate forms and contained an extensive questionnaire occupying 34 printed pages of the record in this case (R. 143-177). Respondent's return to this questionnaire was an elaborate document containing 119 pages of data (R. 57-58). When it was filed the record states that:

> "There were several representatives of the Bureau, both of the accounting and engineering

> sections, engaged in conferences with different representatives of the defendant during the working or weekdays between February 14th and 23rd, approximately 8 or 9 days" (R. p. 60).

They rejected some items, required a correction of others and allowed still others to stand. At the conclusion of these conferences, they submitted a report of their work to the Commission covering 4 printed pages of the record, itemizing the deductions and corrections which had been made and explaining the reasons therefor (R. 210-214, 214-217). The computations were in odd dollars and cents and not in round numbers. It was very far from merely drawing a number from a hat or making a guess. This evidence certainly justified the lower courts in finding that at the very least, the Commission had made an earnest *bona fide* effort to satisfy its mind with certainty that the amount certified was really due.

Men might differ in their opinions of the thoroughness of this work. One man prone to work by generalization and hasty conclusions might characterize it as unnecessarily thorough and cautious. Another man prone to most meticulous detail might regard it as insufficient, perfunctory or a mere estimate. The fact that an examiner employed by the Bureau used the latter adjective as his characterization of the work cannot invalidate a solemn declaration by the Commission itself, that it considered its work a definite ascertainment and a proper exercise of the discretion conferred upon it by Congress. The testimony that

the Examiner had been "instructed to make the same kind of examination as those made upon applications for advances under Section 209 (h), which required merely an estimate of the Guaranty", proves no insufficiency in this ascertainment. It may simply go to show that the Commission had been very cautious and thorough in making its previous advances. Moreover, this testimony is directly contradicted by written instructions from the Director of the Bureau, dated March 2, 1921, the day following our certificate, in which it is said, "Partial payments are not based upon estimates as were advances under Section 209 (h), but represent definite ascertainments. * * * Partial payments being based upon definite determinations and not upon estimates, must be based upon the same character of adjustments as final payments are based upon" (R. 253).

The fact that the Bureau originally labeled its report as an "estimate" likewise proves nothing. As petitioner itself points out, the label attached by subordinate employees is not controlling. Certainly it is not so conclusive as to negative, as a matter of law, the Commission's own certificate that it regarded its findings as a definite ascertainment, or to warrant setting aside the findings of two lower courts supporting this certificate.

The fact that the examination was made before Section 212 was enacted, and with the intention of issuing a certificate for credit purposes, upon which the carrier might obtain a bank loan, proves nothing as to the thoroughness of the examination or the definite-

ness of the determination. It would stultify both the Commission and the Bureau to declare that they were purposely careless or that their examination and determination were purposely made uncertain, because it was bank money that was involved, and not Government money. At the very time when this examination was going on, Section 212 was being debated in Congress, and its passage had previously been recommended by the Commission. Its early enactment must have been anticipated at the very time that the examination was being made. As soon as Section 212 was definitely enacted, the Commission, knowing of its requirement of a definite ascertainment, and with full knowledge of the extent of its previous investigations and the definiteness of its previous conclusion, adopted that conclusion as a "definite ascertainment" under the Act. Even though the examination had had the legal status only of an estimate at the time it was made, it could very readily be given the status of a definite ascertainment under Section 212 if adopted and declared to be such by the Commission after the passage of the Act. Two courts have sustained it as such, and we submit that this Court would not be justified in issuing a writ of certiorari to reexamine this question.

On January 29, 1921, more than a month before our partial certificate was issued, the Commission had issued a final certificate to the Norfolk Southern Railway under Section 209 (g), 65 I. C. C. 798 (R. 114-116). This final settlement admittedly involved a definite ascertainment and has never been questioned.

The examination in the *Norfolk Southern case* was also made prior to the enactment of Section 212 and was very similar in scope, method and time expended to that in the Great Northern case. We invite comparison of the examination in the Great Northern case (R. 96-106, inc. and 108) with the examination for the purpose of final settlement with the Norfolk Southern (R. 114-116).

That the Commission was not only in a position to make definite ascertainments at the time of our examination but that it actually contemplated doing so, is further indicated by the letter of January 22, 1921, from Chairman Clark of the Commission, *supra*, in which he said, "It will be noted that such certificates are by the terms of this paragraph to be 'for any amount definitely ascertained by it (the Commission) to be due'. I think there is no misunderstanding in the language. There is no room for misunderstanding of our conception of our duties under it, which is that a partial payment certificate would not be made for any amount in excess of an amount 'definitely ascertained' by us to be due the carrier". This was followed on March 2, 1921, by the written instructions of the Bureau, *supra*, to the effect that "partial payments are not based upon estimates as were advances under Section 209 (h), but represent definite ascertainments." And that was followed in turn by a statement by the Commission itself in 70 I. C. C. 711, decided December 15, 1921, in which the Commission said on page 714, "We are required to make a definite ascertainment for partial payment purposes as

clearly as we are required to make definite ascertainments in final settlements".

Thus the Commission's official statement in our partial certificate that it had definitely ascertained the amount due, is supported by Chairman Clark's letter more than a month previous that it intended to make definite ascertainments and by the Director's written instructions on the following day that definite ascertainments and not mere estimates must be made. And yet this Court is asked to issue a writ of certiorari and to reverse the two lower courts on the bare ground that an Examiner considered the work perfunctory and a mere estimate.

On page 19 of its brief, petitioner asserts that the Commission failed to eliminate deferred items from our claim or to reach an agreement with the carrier as to the net effect of deferred items and that this was in violation of Section 212 (b) and so invalidated the certificate. But at the time of our certificate, the deferred items remaining on our books amounted to only $200,000 (R. 66). The Commission arbitrarily deducted $3,205,688 from our total claim before making its certificate (R. 215). Section 212 (b) imposed no *obligation* upon the Commission to allow anything at all for deferred items or to enter into any agreement regarding them. It merely "authorized" the Commission to do so "whenever in its judgment practicable." As long as a deduction was made, far in excess of the amount of the deferred items, before certifying the balance, there can be no complaint upon this ground.

On page 20 of its brief, petitioner argues that the Commission did nothing more than deduct amounts

"seemingly obviously unallowable" from the amount of our claim, and then make a further arbitrary deduction of $3,200,000 more. This is a very incomplete statement. What really happened was that respondent's claim had been computed according to methods and formulæ known to and studied by the Commission for several months and by the Director General for several years before (R. 63). The Commission made a thorough mathematical check of the figures in these returns to satisfy themselves that there were no mathematical errors (R. 98). Claims for increase in prices were thoroughly checked and corrected (R. 98, 99).

Section 209 specified the methods which the Commission was to follow in making these allowances and the Commission attempted to comply with all these requirements as far as the amount of information and time available would permit (R. 62). An elaborate report of the allowances, rejections and corrections was submitted by the Bureau in writing in which the Bureau concluded, "We have examined the data submitted by the applicant and find that the Government would have to pay not less than $15,705,688 to make good the guaranty, of which $6,500,000 has already been advanced" (R. 215).

On page 18 of its brief, petitioner argues that "until the Commission had determined basic principles to be applied in computing the Guaranty, it was not possible definitely to ascertain that any particular amount was due on account of the guaranty to respondent." But the Commission had admittedly "definitely ascertained" the amount due to the Norfolk Southern Railway, more than a month prior to our partial certificate,

by making a final certificate under Section 209 (g) in favor of that carrier, which has never been questioned. That the Commission itself considered the basic principles sufficiently settled for the purpose of a definite ascertainment is indicated by the fact that at the presentation of respondent's claim on February 14, 1921, respondent's General Auditor was advised by the Assistant Director of the Bureau that respondent could get either a final settlement or an advance and that either would take about ten days' time. Certain claims of the respondent would be rejected in either case but respondent chose a partial payment rather than final settlement in the hope that claims then being rejected might later be allowed (R. 108). However, this offer from the Bureau is positive proof that they then considered the basic principles to be sufficiently settled for the purpose of a final determination.

The statute did not specify that the method of ascertainment should be by first determining "basic principles" and then applying them to individual cases. The principles and methods used in computing our allowances had been known to and under study by the Commission for months (R. 63). Some of these principles had been disapproved by the Commission and others had been questioned. Still others had not been questioned. Where the methods were either disapproved or questioned, items under them were rejected from our claim. Only methods and principles as to which no question had then arisen were allowed to stand. The Government witness himself says, "Wherever the defendant had followed a method or principle

which the Commission considered questionable, it made a deduction to cover it'' (R. 69). We submit that it was entirely competent and lawful for the Commission to study the methods and items of our claim and to determine which of them it would reject and which it would allow to stand, and to base a certificate on the items thus approved, even though it had not previously adopted these methods or principles for general use. This is exactly what it did in making a final settlement with the *Norfolk Southern Railway* (R. 114-116).

Section 212 (a) specifically provides that ''The Commission, *if not at the time able finally to determine the whole amount due* * * * may make its certificate for any amount definitely ascertained by it to be due.'' The fact that it was not yet able to make a final certificate was not to prevent its making a partial certificate, but on the contrary it was expressly authorized to definitely ascertain a partial amount even though not able to make a final determination as to the entire amount.

In the first paragraph of Part II of its brief, petitioner bases its case on the contention that there is ''convincing evidence'' that the Commission did not make a definite ascertainment. After the trial court has passed on the facts and the evidence, its findings have the effect of a jury verdict, and it takes something more than ''convincing evidence'' to reverse its findings. In order to obtain a reversal, the findings must be without any substantial evidence to support them. Petitioner does not seem to claim that in this case.

We submit that there is nothing in Part II of petitioner's brief to warrant a writ of certiorari and that when the Commission's own certificate asserts that it has made a definite ascertainment, and after two lower courts have found to the same effect, this court should not issue the writ on such testimony of a subordinate employee as is offered here.

Our Defense Not a "Technical" One.

In the first paragraph of its "Argument," petitioner says that respondent "rests upon the technical defense that Section 212 bars the recovery of this overpayment." We protest against this statement. As a matter of fact, we offered ample evidence to prove that the payments which we have received were inadequate and that the Commission's final certificate was based upon grossly erroneous methods and principles (R. 102-113, 154-155). We do not discuss this evidence here because the trial court considered it irrelevant and did not pass upon it. But we are prepared to satisfy any court that we have been grossly underpaid and not overpaid and that we are not seeking to retain on a technicality what does not belong to us as of right.

Our actual expenses for maintenance during the Guaranty Period were $28,892,000, while the amount which the Commission allowed in its final order of 1926 was only $23,815,000, a shortage of more than $5,000,000 which we had to bear by shrinking our guaranteed compensation (R. 108). The final certificate of 1926 for $11,170,214.02 eliminated the tremendous sum of $4,535,473.98 from the amount of $15,705,688 which the

Bureau reported, on February 28, 1921, as the amount to which we were entitled (R. 215). The Government has failed to point out any erroneous item in the larger amount. It made no attempt to satisfy the court that the methods used in making the final certificate were more sound or the result more correct. The final certificate of 1926 was made by a Commission with seven new members. We have a simple case of a difference of opinion by two different bodies of men. We believe that our evidence contained in this record proves conclusively that the later decision was grossly inadequate and the Government offered no evidence to prove it more correct. We feel that we cannot submit this brief without a protest against the charge that we are relying upon a technical defense to retain an overpayment.

Conclusion.

We conclude that in Part II of its brief, petitioner is asking the court to review a voluminous record to find merely "convincting evidence" that the Commission made no definite ascertainment, notwithstanding its own certificate and the findings of two lower courts to the contrary. We believe that the evidence in our favor on this question is so overwhelmingly convincing that no seriously debatable question is presented.

In Part I of petitioner's brief, this court is asked to review a question of statutory construction, as to which the wording of the statute and the legislative history are so plain that the Government itself conceded the correctness of our construction in the court below. We can only conclude that that question is resurrected here

in the hope, not that the Government may prevail on that question, but that, being here on that question, this court may then be induced to review the other question of fact. We believe that neither question permits of a reasonable doubt serious enough to justify a writ of certiorari. We earnestly submit that this court should not be burdened with such a case and that the final decision should not be delayed.

Respectfully submitted,

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R. E. L. SMITH,
Attorneys for Respondent.

Dated at Washington, D. C., May 21, 1932.

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IN THE

Supreme Court of the United States

No. 96

October Term, 1932.

THE UNITED STATES OF AMERICA,

Petitioner,

v.

GREAT NORTHERN RAILWAY COMPANY,

Respondent.

On a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF RESPONDENT GREAT NORTHERN RAILWAY COMPANY.

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IN THE

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THE UNITED STATES OF AMERICA,

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Respondent.

BRIEF OF RESPONDENT GREAT NORTHERN RAILWAY COMPANY.

STATEMENT.

NOTE: References to Section 209 and sub-paragraphs and to Section 212 throughout the following discussion are to the Transportation Act of 1920, 41 Stat. L. 464 and 1145, pertinent portions of which are set forth in the Appendix.

Comparison of the Commission's Two Computations.

On February 28, 1921, the Commission's Bureau of Finance transmitted its report to the Commission stating, "We have examined the data submitted by the applicant and find that the Government would have to pay *not less than $15,705,688*, to make good the guaranty, of which $6,500,000 has already been advanced * * *. Balance ascertained to be due carrier

$9,205,688 * * *. Upon the showing above indicated partial payment of $6,000,000 is recommended to be issued * * *." (Italics ours.) These quotations are from defendant's Exhibit C, appearing near the bottom of pages 215, 216 and 217 of the transcript.

This computation followed a year's intensive study of the subject by the Commission and was made a month after the Commission had commenced to make final settlements with other carriers (R. 62, 72).

Upon reciving the above report, the Commission issued its certificate of March 1, 1921, under Section 209(g) as amended by Section 212, in which it "ascertained and hereby certifies to the Secretary of the Treasury that the amount of $6,000,000 *in addition to any other sum or sums heretofore certified* in favor of the carrier under Section 209 of the Transportation Act 1920, is necessary to make good to said carrier the guaranty provided by the said section. The Commission hereby certifies that such amount of $6,000,000 *cannot be reduced by further accounting or otherwise*, and there may be, upon further investigation, additional amounts found due to said Great Northern Railway Company * * *." (Italics ours.) (Government's Exhibit 1, page 5, R. 135, 136.) This $6,000,000 plus the $6,500,000 previously advanced, made a total payment of $12,500,000.

More than five years later on June 8, 1926, the Commission issued a final certificate under Section 209(g), that the "amount necessary to make good to said Great Northern Railway Company the guaranty * * * is eleven million one hundred seventy thousand two hundred fourteen dollars and two cents ($11,170,214.02)". (Government's Exhibit 1, page 11, R. 142). We have already seen that the report of February 28, 1921, computed the amount of our guaranty at $15,705,688.

It thus appears that the certificate of 1926 eliminated the tremendous sum of $4,535,473.98 from the amount which had previously been computed.

In computing the carrier's railway operating income under the Guaranty Act, the Commission, instead of deducting the carrier's *actual* maintenance expenses from its revenues, was to determine a maximum amount to be allowed for maintenance expenses (Transportation Act, Section 209(f) (3).)

The carrier's actual expenditures for maintenance during the Guaranty Period amounted to $28,892,000. No specific item in this amount was ever criticized, but the Commission's theoretical computations produced much smaller sums as the proper allowance for maintenance. The amount allowed for maintenance in computing our partial payment of $6,000,000 on March 1, 1921, was $27,233,000 or more than one and a half million dollars less than our actual expenses. In making the final certificate of June 8, 1926, the amount allowed for maintenance was only $23,815,000, so that in this case, the theoretical computation produced an amount more than five million dollars less than our actual expenses, and about three and a half million dollars less than the amount computed in making the partial certificate (R. 108). This means that under the Commission's final certificate, the carrier would be compelled to bear five million dollars of its maintenance expenses during the Guaranty Period out of its own funds, thus shrinking its guaranty compensation to that extent.

Between the dates of these two conflicting findings, the personnel of the Commission had very greatly changed, seven of the eleven Commissioners who joined in the final certificate of 1926 having become members since the date of the partial certificate of March 1, 1921, so that the later certificate was not made by a more experienced Commission. This appears from

the annual reports of the Commission. Only four of the Commissioners who made the partial certificates remained upon the Commission when the final determination was made.

There was a difference of $4,535,473.98 between the $15,705,688 determined upon as the amount of our guaranty in the Bureau report of February 26, 1921 (Exhibit C, R. 215) and the $11,170,214.02 named in the final certificate; and a difference of $1,329,785.98 (the amount sued for in this case) between the final certificate and the $12,500,000 certified to by the Commission on March 1, 1921, and actually paid. The Government offered no evidence as to what the items of this difference consisted of and did not produce the detailed work sheets or computations by which either the larger amounts or the smaller one were produced. The Government does not attempt to put the court in a position where it can determine for itself whether any errors were made in either figure. The only explanation of the differnce is that the Commission, as constituted on June 8, 1926, the date of the final certificate, had adopted different methods of computation (which are not described in detail and the correction of which the court is not asked to pass upon) from those used in reaching the larger amount.

However, we can gather from the record the following explanation of what must appear to be a ridiculously wide departure in the final certificate, not only from the Commission's original computation but from the carrier's actual expenditures. In fixing the allowance to each carrier for its maintenance expenses, the Commission was to start with that carrier's average six months' expenditure during the pre-war test period as a base, and to adjust this amount for (1) changes in the amount of property maintained, (2) changes in intensity of use of that property and (3) changes in cost of labor and

material, "so that the result shall be, as nearly as practicable, the same relative amount, character and durability of physical reparation" (Section 209(f) (3); Section 5(c) of Federal Control Contract, R. 155). Thus an expenditure of ten million dollars in the test period would be increased to eleven million dollars if 10% more property were maintained; and to $11,550,000 if there were a 5% greater intensity of use; and this amount would be doubled and fixed at $23,000,000 if costs of labor and material were found to be doubled. The making of these adjustments was the principal task before the Commission (R. 56).

In arriving at the original computation of $15,705,688 as the amount due us under the guaranty, various items of our test period expenses, such as the cost of maintaining locomotives, freight cars, passenger cars, track and other items of property were first segregated, and then the proper percentage of increase for each item was computed and applied separately (R. 98, 99). Similarly the percentage of increase in use of cars was computed separately for road haul, switching and loading (R. 103, 104). There were many different subdivisions or groupings in both the maintenance of way accounts and maintenance of equipment accounts, for each of which a separate precise factor of increase was computed and applied (R. 100).

On the other hand, in computing the amount of our *final* certificate, the Commission eliminated these refinements and accuracies. It grouped together not only all of the different classes of property of a single carrier but all the property of all the carriers in a territorial group. It declared that the test period expense of each carrier "shall be multiplied by a factor representing the increase in the general level of cost of labor and material for the territories in which the lines of railroad of the carrier are situated (R. 190). The allowance to

each carrier was to be fixed with reference to the increase in costs, not of its own labor and materials, but of those of other carriers. This factor was fixed "in the exercise of a reasonable judgment" rather than "upon the basis of any rigid rule or formula" (R. 190). The Commission said, "our territorial or regional factor represents our judgment of the composite increase in the general level of the prices of materials and wages of labor in the carrier's territory. It has not been and cannot be divided into separate factors * * *". (R. 194).

The amazing reduction in the amount computed to be due us from the original computation of $15,705,688 to $11,170,214.02 as computed five years later in the final certificate is explained largely by this abandonment of the method of precise computation and the resorting to "judgment" factors and general averages. For example, the substitution of the general territorial average increase in cost of labor and material for the precise increases applicable to each class of labor and material reduced our allowance by more than a million dollars (R. 106). By using one general average increase for all the difference uses of freight cars instead of the actual increase in each different kind of use, another reduction of more than a million dollars was effected (R. 104).

It should be pointed out here that no part of the alleged "overpayment" under our partial certificate resulted from the allowance of any *character of items* which the Commission subsequently rejected. In *Maintenance Expenses Under Section 209*, 70 I. C. C. 115, decided July 12, 1921, the Commission established the rule that no increase should be allowed to the carriers because of the so-called inefficiency of labor during the Guaranty Period, and that depreciation charges should be accrued during the guaranty period only on the basis of pre-war prices, which should not be equated. But at the time of the

making of our partial certificate, both of these questions were unsettled and the Commission accordingly *rejected all* claims for inefficiency of labor, as well as for increased depreciation, before making our partial certificate (R. 67). The reductions in the final certificate were due wholly to changed methods of calculation. The Government witness himself testified as follows:

> "That the difference between the original $15,000,000 and the final $11,000,000 was accounted for almost entirely by the application of the methods of calculating adopted by the Commission instead of the methods pursued by the defendant in submitting its return, and not because of errors or discrepancies in the defendant's return of February 14, 1921; that is, if the Commission had accepted the method followed by defendant in calculating its claim, the Government would have owed the defendant well over $12,500,000, and that the difference between the claim as filed by defendant and as allowed by the Commission grew out of a difference of opinion as to the method of calculation rather than out of errors in the figure submitted." (R. 79).

The Commission's own Bureau recognized that the previous methods of computation produced a result just as likely to be accurate as the later methods of calculation. In the case of the Chicago, Milwaukee and St. Paul Railway Company, a partial payment had been made based upon the method of precise increases applied to separate groups of expenses, just as in our case. When the Bureau came to apply the territorial factor, that factor indicated that the railroad had received an "overpayment" of $359,899.08. Notwithstanding this, the Bureau recommended against making any claim for refund "for the reason that it is believed that insofar as the determination of differences in cost of labor and material rests in the judgment

of the Commission, *its previous ascertainment for the purposes of partial payment was just as definite and valid upon the facts then considered as a subsequent determination made in the light of additional information.*" (Italics ours.) (Ex. E, R. 88, 89, memorandum from the Bureau to Division 4).

The reason why the application of precise rates of increase to separate groups of expenses produced a result in the Great Northern case so much higher than that produced by the territorial average is that an unusually large amount of the Great Northern's expenses fell within groups which were subject to high rates of increase. For instance, the ratio of labor to material was 241% on the Great Northern compared with an average of 197% for other roads in the territorial group, and the factor of increase for labor was sixty points above the factor for material. Similarly, maintenance of way expenses increased by a higher percentage than maintenance of equipment expenses and the Great Northern had a much higher percentage of maintenance of way expenses than the other roads in the district (R. 100, 101).

The Commission did not claim that the former methods of computation were inaccurate, or that any greater accuracy resulted from its more genral averages, but made the change rather to effect economy and speed. After adopting the method of a territorial average and calling for appropriate returns, it said, "These returns * * * will generally suffice for our final determination, and it will not be necessary to place upon the carriers the burden of expense and delay involved in any elaborate statistical compilation." *In the Matter of Final Settlement Under Section 209, etc.*, 70 I. C. C. 711 at 716 (R. 187). It was declared that "attempted refinements by segregation and separation of small classes of the innumerable items involved have only the appearance of greater accuracy. Unless

all items could be so segregated and separated, and the effect of changes in each computed independently, the result would no more nearly approach the truth than does the broad general principle under which we work" (R. 196). It also said, "We are of the opinion that no advantage of nearer approach to accuracy is to be had by attempting separate adjustments than by the method we follow" (R. 197). In other words, it appears from the Commission's own declarations that its later method was assumed to be as good as but not better than the former method and that it was adopted for the sake of expediency rather than accuracy.

The first announcement of the method of general territorial averages was made on December 15, 1921, *In the Matter of Final Settlement Under Section 209 of the Transportation Act 1920*, 70 I. C. C. 711. Prior to the adoption of this method, final settlement, had been made with five carriers. These were *final* settlements under Section 209(g) and were in addition to partial certificates which had then been issued to 215 carriers (35th Annual Report of the Interstate Commerce Commission for 1921, issued December 1, 1921, pages 23 and 211). The original method of figuring precise increases for separate subdivisions of the carrier's property had been applied in making final settlement with the Norfolk Southern R. R. Co. and presumably had been used in all of the final settlements theretofore made (R. 114, 115, 117). The Government's position is that these settlements, even though figured by the precise computation method, are beyond attack and that they cannot be refigured or refunds claimed under the general average method, because they were made as final settlements under Section 209(g); but that partial payments computed in the same method under Section 212 can be recomputed under the general average method and refunds claimed, even though the result figured by "judg-

ment" factors and general averages is four million dollars less than when figured by precise increases and five million dollars less than the carrier's actual expenditures.

If the Great Northern had accepted final settlement in place of its partial settlement, the payment would undoubtedly have been figured on the basis of precise increases and would have produced a certificate and payment at least approximating $15,705,688 then computed to be due. We would then have been permitted to retain without question not only the $1,329,785.89 for which this suit is brought, but the additional three million dollars which the Government was then willing to pay; as we would then be in the same position as the other carriers with whom final settlement was made during the year 1921. It is only because our payment was labeled "Section 212" instead of "Section 209(g)" that the Commission claims the right to recompute it by the method of general territorial average, and not only to withhold the additional three million dollars to which we were then found to be entitled but to recover $1,329,785.89 of what was actually paid to us.

Thoroughness of the Commission's Original Computation.

Under the Federal Control Contract, the Director General of Railroads was obliged to make similar computations of allowable maintenance expenses. He had commenced the study of this subject three years before the date of our partial certificate and had prepared elaborate forms (R. 62). The Commission's Bureau of Finance started functioning in respect to claims for guaranties directly after March 1, 1920, or one year before our partial certificate was made (R. 60, 61). It had about 100 employes of whom about 40 were working on guaranty matters (R. 55). During this year, it had before it the formulae which had been adopted by the Director General and

had had conferences with the Director General on the subject. It "took advantage of and had the benefit of what the Director General had done" (R. 63). In addition to this, a standing committee of the carriers, called the Railway Executives Committee and various sub-committees of that organization had promulgated a very elaborate formula which was submitted to the Commission about May or June, 1920. The Great Northern claim was based largely on this formula (R. 63). "In addition, the Commission had called upon the carriers for suggestions and ideas as to methods which should be followed in determining the guaranty and had met with the adjustment committee and other carriers' representatives in oral conferences practically throughout the Guaranty Period, discussing methods and principles to be followed" (R. 63). All this occurred during the year preceding our original partial certificate. This is the testimony of the Government witness.

The Commission had issued three general orders during the preceding year, giving instructions as to methods of calculating the guaranty (R. 143, 174, 176). The last one, that of October 18, 1920, prescribed elaborate forms and contained an extensive questionnaire occupying 34 printed pages of the record in this case (R. 143, 177). Respondent's return to this questionnaire was an elaborate document containing 119 pages of data (R. 57, 58). When it was filed, the record states that, "There were several representatives of the Bureau, both of the accounting and engineering sections, engaged in conferences with different representatives of the defendant during the working or week-days between February 14th and 23rd, approximately 8 or 9 days" (R. 60). At the conclusion of these conferences, they submitted a report of their work to the Commission covering 4 printed pages of the record, itemizing the deductions and corrections which had been made and explaining the reasons

therefor (R. 210-214, 214-217). The computations were in odd dollars and cents and not in round numbers. If an equal amount of time were given to each of the 200 odd other carriers in the United States, it would have taken four or five years to settle all the guaranties.

Our witness, Mr. Turnburke, described the process of determination used by the Commission in much more detail, stating that he had working papers from which it could be mathematically determined just what they did (R. 97). The representatives of the Commission checked our return thoroughly, eliminated items which were doubtful, called for additional information on other items, adopted different methods for determining certain items, and "made a thorough mathematical check of the figures in these returns to satisfy themselves that there were no mathematical errors" (R. 98). For this purpose, representatives of the Commission paired with representatives of the carrier, each pair working upon different items, and this process continued all day every day from February 14th to February 23rd (R. 59).

No methods of computation which the Commission then considered questionable or unsettled were allowed to stand and all items as to which any doubt existed were eliminated. "Wherever defendant had followed a method or principle which the Commission considered questionable, it made a deduction to cover it" (R. 69). For instance, our return included a claim for so-called ineffectiveness of labor and also a claim for increase of test period depreciation charges to reflect increases in values. At this time the Commission had not definitely decided whether such claims would be allowed or not, and accordingly they were rejected in making the partial certificate, not because the Commission had then finally determined that they were not allowable, but merely because they were questioned and had not been decided (R. 67).

The methods followed and the thoroughness of the work were the same in all respects as in the case of the *final* settlement with the Norfolk Southern which had been concluded a month previously (R. 72, 114-115, 117). We invite detailed comparison of the method of examination in the Great Northern case (R. 96-106, inc. and 108) with the examination for the purpose of final settlement with the Norfolk Southern (R. 114-116).

That the Commission had all the necessary data and was in a position to make a definite ascertainment is indicated by the fact that at about the time our partial certificate was issued, our General Auditor, in conversation with Col. W. A. Colston, the Director of the Commission's Bureau of Finance and G. I. Bunting, Assistant Director in Charge of the Section of Accounts and Statistics, was told that the Commission was ready to issue a final certificate under Section 209(g) if defendant desired it, but that it would take about ten days (R. 108). However, the defendant preferred to defer the final certificate in the hope that items which the Commission was then questioning and therefore rejecting might later be allowed, which would result in a payment even larger than the $15,705,688, which had then been computed. In order to avoid having to waive such items, defendant accepted a partial certificate instead. This decision cost us over $3,000,000.

That the Commission was not only in a position to make definite ascertainments at the time of our examination but that it actually contemplated doing so is further indicated by a letter of January 22, 1921, from Chairman Clark of the Commission (Congressional Record, 66th Congress, 3rd Session, pages 108, 109), in which he said, "It will be noted that such certificates are by the terms of this paragraph to be 'for any amount definitely ascertained by it (the Commission) to be due'. I think there is no misunderstanding in the language. There

is no room for misunderstanding of our conception of our duties under it, which is that a partial payment certificate would not be made for any amount in excess of an amount 'definitely ascertained' by us to be due the carrier". This was followed on March 2, 1921, by written instructions of the Bureau, to the effect that "partial payments are not based upon estimates as were advances under Section 209(h), but represent definite ascertainments" (R. 218). And that was followed in turn by a statement by the Commission itself in 70 I. C. C. 711, decided December 15, 1921, in which the Commission said on page 714, "We are required to make a definite ascertainment for partial payment purposes as clearly as we are required to make definite ascertainments in final settlements".

SUMMARY OF ARGUMENT.

I. Part I of Petitioner's brief is inapplicable. In the decisions cited, proof had been offered in court showing mistake or error in the original determination. No such proof was offered in the present case. The cases do not sustain the proposition that an "overpayment" by an administrative tribunal is established by a mere later recomputation of a smaller amount by the same tribunal without proof of mistake in the prior computation.

II. Section 212 provides for a definite ascertainment and for a payment as distinguished from an advance. It provides specifically that as to certain items the determination shall have only *prima facie* effect, thereby implying that it should be conclusive as to all others. An attempt to amend this section by providing for refund in the event of a final determination for a smaller amount was voted down. In the debates, it was fully explained by members in charge of the bill that

the payment was to be a binding one and not subject to refund or recovery. The Chairman of the Commission had advised the Congressional Committee prior to the passage of the bill that such would be the Commission's understanding.

III. There was no mistake nor error and the requirements of the statute were fully complied with. The Commission declared in the partial certificate itself as well as in other documents that it intended a definite ascertainment and not a mere estimate. The Commission was already prepared to make *final settlements* with carriers and had actually done so. It had had an elaborate organization employed in the study of the subject for a year and made a thorough study and detailed computation of our allowance. No items were allowed and no methods were followed which were not definitely adopted and in use at that time or which were then in question or undetermined.

ARGUMENT.

I. *"Overpayment" by an administrative tribunal is not established by a mere later recomputation of a smaller amount by the same tribunal, and refund cannot be recovered without proof of mistake or fraud, except in cases where the statute makes the final determination controlling.*

In part one of its brief, the Government cites the following cases which are alleged to support the proposition that "overpayment" by an administrative tribunal is established by a mere later recomputation of a smaller amount by the same tribunal and that refund of such overpayment can be recovered without other proof of fraud or error.

Wisconsin Central R. R. Co. v. United States, 164 U. S. 190.

Grand Trunk Western Ry. Co. v. United States, 252 U. S. 112.

United States v. Burchard, 125 U. S. 176.

Burnet v. Porter, 283 U. S. 230,

and other cases cited in the foot-note.

None of these cases support the rule contended for because in each of them the original payment was made under an actual mistake, either of fact or law, and the court was able to satisfy its own mind that such a mistake had been made. Where the mind of the court is not satisfied that mistake or fraud existed in the original payment, the mere fact that a recomputation of a smaller amount has subsequently been made by the same tribunal does not in itself prove an "overpayment", nor establish a cause of action for recovery of the difference.

Kendall v. United States, 12 Pet. 524.

United States v. Mason, 33 Dist. Ct. App. 350.

Noble v. Union River Logging R. Co., 147 U. S. 165.
Dougan v. United States, 34 Ct. Cl. 458.
1st Natl. Bank v. United States, 15 Ct. Cl. 225.
United States v. Kaufman, 96 U. S. 567.
United States v. City of Louisville, 169 U. S. 249.

In line with these decisions, the Government concedes on page 18 of its brief that the Commission could not make subsequent corrections of a *final* certificate made under Section 209(g) and thereby establish an "overpayment" and a right of recovery. To sustain recovery in such a case it would clearly be necessary to satisfy the mind of the court that the amount paid in final settlement had resulted from actual fraud or mistake.

It is true that in this case the subsequent computation was one that was expressly authorized by Section 209(g). This raises a question different from those in the cases above cited and one that will be discussed in the next section of this brief. We desire to point out here, merely that the decisions cited in part one of the Government's brief are not in point because the recovery in those cases was based upon proof of actual fraud or mistake and not upon a mere subsequent recomputation by the administrative tribunal.

It is, of course, entirely competent for a legislative body to authorize two computations and to make the first one subject to the second, so that a mere recomputation by the administrative tribunal would in itself establish a cause of action. Congress did this very thing in paragraphs 209(h) and 209(g). Section 209(h) authorized a preliminary computation and a payment or advance of the amount computed, but specifically provided that it should be subject to a subsequent computation under Section 209(g) and to refund of any excess.

But Section 212 provided for a very different kind of a prior computation. It was to be a "definite ascertainment" and the amount computed was to be a "payment" and not an advance. It is true that authority for a subsequent determination under Section 209(g) still remained, but there was no provision giving it precedence over the prior determination. And the evidence is overwhelming, both in the wording of the statute and in its legislative history, that a subsequent computation for a smaller amount was not to be proof of an "overpayment", or to establish a right to a refund without proof of actual fraud or mistake. This is the question presented by the present case and which we will now discuss. The decisions cited in part one of petitioner's brief have no bearing upon this question and throw no light upon the matter.

On page 16 of the Government's brief it is alleged that there is a "perfect analogy" between the cases cited and the present case because "in each situation there is an administrative determination followed by a payment of public money, and thereafter another administrative determination that the payment made was excessive". But in the cases cited there was a third step, i. e., the satisfying of the mind of the court that the first payment was made under error. In the present case this third step is not taken. Here the second administrative finding is relied upon as establishing a cause of action *per se*. There is no support for this in any of the decisions cited.

II. *Final certificates under Section 209(g) do not take precedence over partial certificates under Section 212. Payments under partial certificates become vested in the payee subject to recovery only upon proof of mistake or fraud.*

The original complaint was drawn solely upon the theory that the mere making of the final certificate for a smaller sum

was sufficient to prove overpayment (R. 1-5). Our demurrer to this complaint was sustained on the ground that the final certificate was not in itself sufficient to prove overpayment (R. 7-14). The plaintiff thereupon filed its amended complaint, adding paragraph 12 alleging mistake in the making of the partial certificate (R. 18).

Since plaintiff failed to allow judgment to be entered upon the order sustaining our demurrer, and to appeal therefrom, the ruling of the lower court becomes the law of the case, and the plaintiff is foreclosed from renewing that issue in this court.

Poling v. Jeffords, 56 App. D. C. 88, 10 Fed. (2d) 653.
U. S. v. Boyd, 5 How. 29.
Clearwater v. Meredith, 1 Wall. 25.

Even if this question were still open, however, we submit that the decision of the lower court is sound.

If there were nothing in this case except an authority in the Commission to make a prior award and then a further authority to make a recomputation and a final award, it might be argued that the Commission in Guaranty Period matters was a continuing tribunal authorized to deal with the subject in the light of all its accumulated experience and not precluded from revising its opinion in any case while the case was still before it for further consideration. Such was the procedure under Section 209(h). But we shall point out that Section 212 provided for a radically different procedure.

It must be conceded that Congress had the *power* to provide for prompt partial payments, even though not complete or final, but which should nevertheless be binding *pro tanto*. It had the power to declare that the aggregate of payments so received might be retained by the carrier in satisfaction of the

guaranty, even though the complete and final determination might be for a smaller sum.

That it intended to do this, and that the partial certificates were intended to be binding *pro tanto* is indicated by the following considerations:

(1) The *wording* is similar to that of Section 209(g), which authorizes the final settlement, and which the Government concedes would be binding. Section 209(g) says, "The Commission shall * * * *ascertain* and certify * * * the several amounts necessary to make good the foregoing guaranty * * * ". Section 212 says, "The Commission, if not at the time able to determine the whole amount due * * *, may make its certificate for any amount definitely *ascertained* by it to be due * * *". Both sections use the word "ascertain", but Section 212 adds the word "definitely", so that the wording of Section 212 is even stronger than the wording of Section 209(g), which admittedly provides for a determination that shall be binding.

(2) Section 212 contains two paragraphs. Paragraph (b) covers "deferred debits and credits" such as unsettled damage claims, while paragraph (a) covers all other items. Paragraph (b) permits a reasonable estimate of deferred debits and credits to be used as a definitely ascertained amount, but provides that such estimates "shall be *prima facie* but not conclusive evidence of their correctness in amount in final settlement". There is no such provision as to items other than deferred debits and credits, and which are covered by paragraph (a). If all items certified under Section 212 were to be merely *prima facie* but not conclusively correct, as claimed by the Government, why enact a special provision to that effect as to one class of items only? In this sentence, Congress had apt lan-

guage for the purpose of making the entire certificate *prima facie* but not conclusive, and it rejected that language except as to deferred debit and credit items. *Expressio unius exclusio alterius.*

This reasoning is strengthened by the legislative history of paragraph (b). As this paragraph was introduced, it provided that the Commission's "reasonable estimate" of the net effect of deferred debit and credit items, when agreed to by the carrier could be used as a definitely ascertained amount, and that such estimate so agreed to "shall be binding in final settlement". Mr. Dewalt offered an amendment striking out the word "binding" in the last line and inserting the words "*prima facie* but not conclusive evidence of their correctness in amount". This amendment was debated on pages 2815 and 2816 of Congressional Record, Volume 60, Part 3, and was adopted by a vote of 116 ayes, and 95 noes. Thus Congress drew a distinction between deferred debit and credit items mentioned in paragraph (b) which in the nature of things could not be definitely ascertained, and all other items, covered by paragraph (a), which could be definitely ascertained. The deferred debits and credits were made "*prima facie* but not conclusive" while the definite ascertainment of all other items, under paragraph (a), was left conclusive and binding.

This becomes all the more significant when we find on page 2812 of the Congressional Record (Vol. 60, Part 3) a similar attempted amendment of paragraph (a) which was voted down. In other words, as originally introduced, both paragraphs were to be binding. Separate amendments were proposed as to each paragraph, the effect of which would be to make the certificate subject to correction and refund. The amendment was voted down in the case of paragraph (a) and adopted in the case of paragraph (b). Refund was specifically denied under paragraph (a).

3. Congress also rejected the language of Section 212(h) which would have aptly provided for the refund now claimed. Under the Government's contention, a payment under Section 212 would assume exactly the same status in law as the advances which had been provided for under Section 209(h), except that no security for their refund would be required. Under Section 209(h), the Commission had been authorized to make advances on account of the guaranty during Federal Control upon mere estimates and without any "definite ascertainment", and upon an express promise by the carrier, secured by bond, to refund any excess over the amount of the final certificate. The Government contends that Section 212 was intended to establish exactly the same obligation except for the security, and that the only reasons why a new statute was required were, first to dispense with the security, and second, because the advances provided for in Section 209(h) were limited to the terms of the Guaranty Period and could no longer be made on March 1, 1921, when Section 212 was passed. If this had been the intent of Congress, the simple obvious way to accomplish it would have been to enact that advances under 209(h) might still be made and that security need not be taken. Merely striking the words "during the Guaranty Period" and the words "secured in such manner as the Secretary may determine" out of Section 209(h) would have accomplished this object.

But it is suggested that since the security was to be dispensed with, it was necessary to require a more careful estimate, and that for this reason, Congress may have wished to pass a different statute in order to provide for a "definite ascertainment" instead of an estimate. This object, however, could easily have been secured by striking the phrases just quoted from Section 209(h), and by substituting the words "as the Commission may definitely ascertain are not in excess of the amount

necessary", etc., for the words "not in excess of the estimated amount necessary", etc.

Congress would then have had a paragraph specifically calling for refund in case of excess, and specifically accomplishing the very object which the Government asserts was its intention. The fact that it had before it in Section 209(h), apt language calling for repayment, and that it rejected such language, and provided for a definite ascertainment and partial payment without provision for refund shows conclusively that the intention was that there should be no refund.

It appears from the debates in Congress, quoted below, that there was good reason for eliminating the idea of a mere advance subject to refund. To have provided for mere advances under Section 209(h), would have placed cash in the hands of the railways, but would have left them uncertain as to how freely they could use it, or whether they might not have to refund it. To avoid this, Congress enacted Section 212, providing for definite payments.

4. If the wording of the statute itself leaves any possible doubt as to its intent, this must be set at rest by the legislative history of Section 212. That it is proper to consider these appears from the following decision:

> "Where doubts exist and construction is permissible, reports of the committees of Congress and statements by those in charge of the measure and other like extraneous matter may be taken into consideration to aid in the ascertainment of the true legislative intent. * * * But the reasons for and the significant circumstances leading up to the enactment may be noticed in confirmation of the meaning conveyed by the words used."
>
> *United States v. Missouri Pacific R. Co.*, 278 U. S. 269 at 278.

During the debates on Section 212, those opposing the measure repeatedly objected to the bill on the ground that certificates issued under its provisions would be conclusive, and the majority members of the Committee who were in charge of the bill replied that this was exactly the result intended; that they proposed to make the partial payment as binding for the amount involved as the final payment would be. We will quote here some short examples of this, the emphasis being supplied by us.

In Volume 60, Part 3 of the Congressional Record, on page 2739, Mr. Sims, a minority member said:

> "This bill provides no protection to the Government in case of excess payments on certificates. It provides that the Interstate Commerce Commission's certificates must be paid in full and no return whatever to the Government is provided for such excessive payment."

On page 2813, Mr. Barkley, a minority member of the Committee, said:

> "But suppose it turns out afterwards that there is a mistake, and suppose that the railroad has put something over the Interstate Commerce Commission in arriving at the estimate. Then, under the language of this bill, that estimate which has been arrived at must be *final settlement as to that item,* and the Government has no recourse to offset that claim against another claim that may be adjusted in the future."

A little further down, Mr. Barkley says:

> "But if you leave the language like it is, you have this situation: every road will insist upon settling each one of these items at a time, and when one of them has been settled, the Government is bound by that settlement."

The foregoing quotations are from remarks by members of the opposition who pointed out very clearly that certificates

issued under the proposed bill would be binding upon the Government. That this was fully understood by the majority members in charge of the bill and that it was the exact result intended to be accomplished appears from the following quotations:

Mr. Denison, page 2813, said:

"The Interstate Commerce Commission is the tribunal which we have entrusted with the authority to make these final settlements, and if we can depend upon them to protect the interests of the Treasury in making final settlements, it seems to me we can very well do so in making partial settlements.

Mr. Barkley: But the Interstate Commerce Commission is liable to make mistakes as well as anybody else, and these accounts will be audited by individuals in the Interstate Commerce Commission. Does the gentleman think that the Government should be protected if it should occur that a mistake was made?

Mr. Denison: We have got to reach settlements some time. I was informed this morning that the accounting department of the Interstate Commerce Commission is the finest accounting institution of its kind in the United States if not in the world, and if we cannot depend upon it to safeguard the interests of the Treasury in making these settlements, then we ought to endeavor to provide some tribunal upon whom we can depend."

The following appears on page 2803:

"Mr. Hardy (of Texas): Does not subsection (b) foreclose the Government in any error forever thereafter?

Mr. Barkley: That is my understanding."

Mr. Dempsey said, page 2809:

"Now, the gentleman from Tennessee (Mr. Sims) makes two objections. First he assumes that the Interstate Commerce Commission is to make some fatal error and he

wants to defer that judgment. Is the question to be referred to some other body? Is it to be referred to the Supreme Court? Why, if it is to be determined anyway in the end by the Interstate Commerce Commission—you have the same Commission, you have the same facts, and is the gentleman assuming that *on the same state of facts, the same body will give an erroneous judgment at one time and a correct judgment at another* * * *."

The following appears on page 2809:

"Mr. Reavis: * * * If we pay more under the estimate than we owe and have agreed to what has the Interstate Commerce Commission to do with it?

Mr. Dempsey: Why, the Interstate Commerce Commission issues a certificate upon the facts, and its decision is made upon all of the data obtainable.

Mr. Reavis: But if we pay more than is due?

Mr. Dempsey: *We are just as likely to be right now as at any time in the future.*"

Mr. Winslow said, page 2812:

"Under the provisions of the Transportation Act, the amount arrived at and which could be put forward as an advance was the *estimated* amount, and for that reason of estimate, in order to protect the Government, the conditions of the bond or security to cover are provided in the law.

Now, in this instance, we have *another situation.* Whatever amounts will be paid under the Bill before us will represent agreed upon amounts which have been carefully canvassed, and which have been worked out to the satisfaction both of the debtor and creditor. That is a very different situation indeed."

On page 2802 occurs the following:

"Mr. Montague: As I understand it, there is no bond required *if there were only one final payment.*

Mr. Merrit: None.

Mr. Montague: And you simply ask that the *same rule apply here?*

Mr. Merrit: Certainly."

If it be asserted that these were expressions by individual members of Congress only, even though majority members of the Committee in charge of the bill, and that they do not necessarily reflect the opinion of Congress as a whole, we point to the amendment proposed by Mr. Barkley. On page 2812 appears the following:

> "Mr. Barkley: Mr. Chairman, I offer an amendment. * * * At the end of line one, page 2, insert: 'Before making such payment or drawing such warrant, unless it be upon a final settlement, the Secretary of the Treasury shall require the carrier to execute a contract on such security as the Secretary of the Treasury may determine, that upon final determination of the amount of the guaranty under Sections 204 and 209, such carrier will repay to the United States any amounts which it has received from such partial payment in excess of the guaranty with interest at the rate of 6% per annum from the time such excess was paid."

On page 2815, the following action on this amendment appears:

> "The question was taken; and on a division (demanded by Mr. Barkley) there were—ayes 65, noes 115."

It thus appears that Congress not only rejected the apt language in Section 209(h) providing for a refund of excess payments, and rejected in paragraph (a) the apt language which it inserted by amendment in paragraph (b), providing that the certificates should be *prima facie* but not conclusive evidence of their correctness as to deferred items only, but it deliberately and specifically rejected a proposed amendment to Section 212(a), which would have made any excess in the par-

tial payment certificate, over the amount of the final certificate, recoverable.

The intent could be no clearer if Congress had expressly added a clause in Section 212(a) reading, "and no excess in such partial payment over the amount of the final certificate shall be recoverable".

On page 22 of its brief, the Government points out that the Barkley amendment providing for refund and security for the same was opposed on two grounds: first that it would be binding in effect, and second that many short lines could not furnish the security which it required. This court is asked to attribute the rejection of the amendment to the latter ground rather than to the former. However, if this had been the intention of Congress, it would have been necessary only to expunge the words "on such security as the Secretary of the Treasury may determine" from the Barkley amendment, thus leaving the provision for refund in effect. It would be strained indeed to hold that Congress rejected the entire amendment, including the provision for refund merely to get rid of the provision for security.

There also appears in the Congressional Record, 66th Congress, 3rd Session, pages 108 and 109, a letter from Chairman Clark of the Interstate Commerce Commission to Chairman Esch of the Committee on Interstate and Foreign Commerce of the House of Representatives, dated January 22, 1921, while Section 212 was pending, clearly advising the Congress that the Interstate Commerce Commission would understand the bill as authorizing it to make definite ascertainments and definite payments. Chairman Clark said:

> "Paragraph (a) of Section 212 very definitely authorizes certificates in partial payment and payment of such certificates. It will be noted that such certificates are by the terms of this paragraph to be 'for any amount defin-

itely ascertained by it (the Commission) to be due'. I think there is no misunderstanding of our conception of our duties under it, which is that a partial payment certificate would not be made for any amount in excess of an amount 'definitely ascertained' by us to be due the carrier."

5. In the court below, the Government itself was so thoroughly convinced of the soundness of our argument and so hopeless of establishing the position for which it is contending here that it withdrew this contention. In the "Reply Brief for the United States" filed in the Circuit Court of Appeals, the Government conceded on page 3 that "apparently Congress intended the Government to be bound by advances under Section 212, assuming, of course, that the Commission had in truth and in fact made a definite ascertainment required as a prerequisite to such payment." This was also conceded upon oral argument in the court below. We submit that it is unfair to the Circuit Court of Appeals as well as to this Court, to submit a question here which was waived in the court below and to ask for a reversal of the lower court's decision upon a question which was conceded in that court.

The Government's Reply.

In spite of the clear wording of Section 212(a), calling for a binding determination, the corroboration in Section 212(b) providing an exception in the case of deferred debits and credits and the clearly expressed intent of Congress not only in the Congressional debates but in its action upon the proposed amendments, all of which compelled the Government to concede our position in the court below, the Government in part two of its brief now advances various arguments opposing this

construction of the statute, and we desire to notice these arguments briefly.

On page 18, the Government advances an alternative construction by suggesting that even though Congress intended the partial certificates to be something more than mere estimates, it does not follow that it intended to deny the United States the right of recovery in the event that a final certificate should be made for a smaller sum. We believe that there is no room for an alternative of intermediate construction. Any excess over the amount of the final certificate either was or was not to be refunded. If it was to be refunded, the payment was a mere advance on account and no amount of reasoning can give it any other legal status. There is a direct inconsistency and contradiction in asserting that it was something more than an advance on account but that it was still subject to refund and recovery.

On page 18 of its brief, the Government argues that in authorizing "partial payment", Congress necessarily implied that any excess should be refunded, since any payment in excess of the total obligation cannot be a "partial" payment. What Section 212(a) authorizes is not a "partial payment" but the payment of "any amount definitely ascertained by it to be due". If the amount were to be subject to refund, the proper term to use would be the word "advance" which was used in Section 209(h), or the word "loan" and not "payment", whether partial or otherwise. The word "payment" imports finality. This argument of the Government would deny the power of congress to make a payment on account binding.

Petitioner points to the fact that Section 212, after authorizing a partial certificate, proceeds to authorize further certificates, thereby implying that the first certificate is not a final one. Similarly, it is pointed out on page 23 that Section

212(b) specifically provides for further consideration in the making of the final certificate, thus recognizing that the partial certificate was not a final one. And again it is contended that since Section 209(g) itself provides for a final determination, there would be inconsistency in attributing finality to the partial certificate. But clearly Congress had the constitutional *power* to declare that a payment, then regarded as only partial, should nevertheless become vested in the payee without liability for refund, no matter what the final conclusion might be. Notwithstanding the fact that the payment, then regarded as only partial, was to be conclusively vested in the payee, it would still be necessary to provide for further partial certificates, and also for completing the final determination, in order to determine whether any additional amounts were due. Whether the partial certificate were conclusively or only *prima facie* correct, there must still be provision for further partial certificates and for a final determination. The fact that such further steps are provided for, therefore, throws no light whatever upon the question whether the partial certificate was intended to have conclusive or only *prima facie* weight.

On pages 18 to 20, petitioner advances the argument that the word "ascertainment" as used in Section 212 should be given a different meaning and effect from the same word as used in Section 209(g) because of the different objects to be accomplished by the two sections, the primary purpose in Section 209(g) being finality and the fixing of property rights of the carriers, while the primary purpose of Section 212 was promptness in payment. This argument might well have been presented to Congress as a reason for making mere advances on account, instead of binding payments, under Section 212. But after Congress has plainly taken the opposite position, the argument can have no weight with a court. It is clear from

the wording of Section 212 as well as from the Congressional Record that Congress intended to vest property rights and to provide for finality in the certificates under Section 212 as much as in the certificates under Section 209(g). This was the whole burden of the argument of those in charge of the measure. In the financial emergency which existed, it was the desire not only to secure promptness of payment but to give the payee the assurance that it could spend the money as its own and that it need not keep it in reserve to provide for possible refunds. Half of the object of the payment would have been defeated by such a requirement. There is no basis for petitioner's contention that *promptness* was the *only* object and that that object would be sufficiently accomplished by a mere *advance* of money even though the carrier might be afraid to spend it for fear of being called upon for refund.

On pages 19 and 20, petitioner argues that the construction adopted by the courts below is inconsistent with the purpose of promptness "since of necessity all payments would have been withheld until the ultimate right to retain them had been finally determined.

This last statement ignores the fact that Congress had been specifically advised that the Commission was already prepared to make definite ascertainments, and that these would not involve delay. On page 2738 of the Congressional Record, Mr. Cooper had quoted the preceding annual report of the Commission, referring to "the immediate payment to some of these carriers of the amounts or parts of amounts *which we can now determine to be certainly due them*, under the Guaranty provisions of the Transportation Act, 1920". (Italics ours.) And Chairman Clark of the Interstate Commerce Commission had advised the Congressional Committee in the letter above quoted, that "a partial payment certificate would not be made

for any amount in excess of an amount 'definitely ascertained' by us to be due the carrier".

When Section 212 was enacted, the Commission had been studying the formulae and methods of determining payment for a year and had had as many as 40 men employed in this work (R. 55, 62). It had had the advantage of two or three years' previous experience of the Director General in determining the same questions (R. 63). On October 18, 1920, more than 4 months before Section 212 was passed, the Commission had issued its very elaborate order and questionnaire calling upon the carriers for the information necessary to conclude *final* settlements (R. 143). On January 29, 1921, more than a month before Section 212 was enacted, it had actually concluded a final settlement under Section 209(g) with the Norfolk Southern Railway, which is conceded to have been a definite and final ascertainment (65 I. C. C. 798, R. 114-116).

In *Continental Tie and Lumber Company v. United States*, No. 560, decided May 16, 1932, and not yet reported, this Court said:

> "But it is not clear that if the taxpayer had acted promptly an award could not have been made during 1920, or at least the principles upon which the Commission would adjust the railway's accounts to reflect true income have been settled during that year sufficiently to enable the railway to ascertain with reasonable accuracy the amount of the probable award. The reports of the Interstate Commerce Commission show that it was possible for a carrier whose claim arose under Section 209 to obtain a final award early in 1921, prior to the time for preparing its income tax return. (Note No. 3.)

We submit that there is no foundation in the record for petitioner's argument that a requirement of conclusiveness in the

partial certificates would have prevented prompt action. All of the information before Congress was to the contrary.

Finally petitioner submits an elaborate argument apparently taking the novel position that the construction of the statute should be governed by the intent and understanding of the Commission and the carrier at the time, rather than by the intent of Congress and the plain wording of the statute. On page 20, it is pointed out that by making similar overpayments to other carriers, the Commission showed "a contemporaneous construction" of the Act. On page 21, it is said that the respondent, in asking for a certificate under Section 212 in lieu of the credit certificate previously issued, indicated an understanding that it would be subject to revision and correction, and that neither party regarded the certificate under Section 212 as binding.

It seems scarcely necessary to argue that neither a tribunal acting under statute, nor an individual with whom it deals, nor both, can change the effect of a statute or govern its result by their intent or understanding. However, we desire to point out that the Commission did not deliberately include any overpayment either in our case or in that of other carriers. On the contrary, after carefully computing the amount due us, it arbitrarily deducted more than three million dollars in order to be sure that there would be no overpayment. There is no indication here that it contemplated the possibility of a refund. Moreover, if an overpayment was made in our partial certificate under Section 212, similar overpayments were made in many of the earlier *final* settlements which were computed by the same methods. If Section 212 is to be construed as permitting refunds, simply because the Commission was then using more liberal methods of computation, then Section 209(g) must be construed as requiring refunds, upon the same ground.

Moreover, the assumption that neither party regarded the payment as binding is directly contradicted by the debates in Congress, by the letter from Chairman Clark to the Congressional Committee, by the memorandum of instructions issued by the Bureau (Exhibit D) and by the wording of the certificate itself, all of which make it perfectly clear that at that time all concerned except perhaps the Government's witness who testified in this case, understood fully that a definite ascertainment and a binding payment were being made.

On page 23, petitioner asks the court to annul the statute on the ground that the Government would be bound but the carriers would not. This is another argument that should have been presented to Congress. The situation presents the ordinary case of a partial accord, the result of which is that the creditor cannot be compelled to accept any less but the debtor may have to pay more. There is nothing unusual about this situation.

On pages 23 and 24 of the Government's brief, it is argued that while the guaranty is not a gift or a subsidy, it is nevertheless made without direct consideration and must be construed in favor of the Government. The Government had contended in the court below that the guaranty was a gratuity. We deny both that it was a gratuity and that it was made without consideration.

If we grant that this statute was a gratuity and must receive the strictest possible construction, we submit that we have given it such a construction. If we had nothing to go on but the plain meaning of the words "definitely ascertained" in Section 212(a) that should be sufficient. And when that plain meaning is confirmed by contrast with the "*prima facie* but not conclusive" language in Section 212(b), with the provisions for estimates, advances and repayment in Section 209(h), with the

Barkley amendment which was rejected, and with the debates in Congress, we submit that the strictest tests of construction which human ingenuity can suggest are fully complied with.

Moreover, it is not true that the guaranty was made without consideration, in the sense contended for by the Government. Section 209(d) provides that if the carrier's income for the guaranty period as a whole is in excess of the guaranty, the carrier must pay the amount of such excess into the Treasury of the United States. The obligations were reciprocal. The Government was to pay the carrier for any deficit and the carrier was to pay the Government for any excess. And the records show that some of the carriers actually had such excess and actually paid the amount to the Treasury.

And even if we ignore this reciprocal obligation, which was assumed by the defendant, and view the guaranty as though it were entirely one-sided, the debates in Congress and the statements of those in charge of the measure show that the guaranty was not enacted as a gratuitous favor or privilege to railroad stockholders, but in discharge of a public duty and obligation. Such debates appear in the Congressional Record containing the debate in the House of Representatives on Section 209 of the Transportation Act of 1920, in Volume 58, pages 8329, 8331, 8338, 8383, and Volume 59, pages 3330 and 3343. They show that the Government had taken railroads, which at the beginning of Federal Control were prosperous and self-supporting, and had so managed them that at the end of Federal Control, when they were to be returned to their owners, they were not taking in enough money to pay for their operation, and that they would have been forced into immediate insolvency and receivership. This was due not only to the inevitable increase in material costs but to the wage increases which had been instituted under the Adamson Law and by the Director General,

without making corresponding increases in freight and passenger rates. Cars and engines had been taken from the roads where they belonged and scattered about the country. The personnel and official organization of the carriers had been disrupted. Traffic movements which individual carriers had obtained for their lines through years of solicitation had been diverted to other lines. There were ample grounds for enormous claims for legal damages against the Government.

Moreover, the carriers were clearly entitled to substantial and immediate rate increases in order that rates might pay expenses and some return on investment. Statements from the Commission show that it would take at least six months to put such increases into effect. The public undertook to meet its obligation to the carriers through these fixed payments in lieu of meeting them through immediate rate increases.

Another consideration was that a financial catastrophe was feared with consequent unemployment and public suffering and that Government relief was felt to be necessary. The Railroads were to be used as a conduit for this government relief, accepting the money from the Government and expending it in the employment of labor. It would have been highly inequitable to have caused the carriers to receive these payments and to disburse them in the accomplishment of this public object and then to require a refund, thus requiring the railroad stockholders to bear the burden of public relief which the Government itself undertook to bear. We believe that all of these reasons for the passage of the bill are supported by statements in Congress by Committee members in charge of the bill which appear upon the pages cited, and that there was ample and real consideration for the guaranty.

The Decision in the Northern Pacific Case.

The seemingly contrary decision of the Court of Appeals of the District of Columbia in *Northern Pacific Railway Company v. Interstate Commerce Commission*, 23 F. (2nd) 221, was made upon a different state of facts and without knowledge of the legislative history of the Act and the statement regarding the construction of the statute was not necessary to the decision. In that case the carrier filed in the Supreme Court of the District of Columbia, a petition for a common law writ of certiorari to review and set aside the Commission's *final* certificate issued under Section 209(g). It appears from pages 13 to 30 of the brief for the Interstate Commerce Commission which was filed in this Court in opposition to a writ of certiorari, that the main contention of the Government in that case was that the carrier had pursued the wrong remedy in seeking to review the Commission's certificate by common law writ of certiorari from the Supreme Court of the District. Moreover, the effect of a partial certificate was not involved in that case. The proceeding was one to cancel a *final* certificate as invalid. Even though the previous partial certificate issued to that carrier under Section 212 were binding and conclusive, this would not necessarily invalidate the subsequent final certificate under Section 209(g) or warrant the court in setting it aside on writ of certiorari. We submit that the district court in that case should simply have dismissed the application for a writ because of lack of jurisdiction, without attempting to pass upon the conclusiveness of the previous partial certificate.

Moreover, that case presented facts different from those in the present case. On page 224, the court points out that the Northern Pacific in applying for its partial payment had agreed to refund any excess which might later be determined. There was no such agreement in our case.

But the most significant difference is that the debates in Congress upon Section 212 and the extracts from the Congressional Record which we have quoted above were not called to the attention of the District Court of Appeals. A decision by the District Court of Appeals made without knowledge of the legislative history of the Act cannot be regarded as evidence that the conflict is a serious one or that the question is really debatable.

We might add that there is an obvious fallacy and inconsistency in the reasoning of the court in the *Northern Pacific case*. It argues that Section 212 could not have contemplated a "definite ascertainment" because that would have necessarily involved delay and Congress desired prompt action; but at the same time the court says that Congress desired something more than the mere "estimate" provided for in Section 209(h) because the carrier's bond or security was to be dispensed with. In other words, promptness was to be accomplished by *avoiding* a thorough investigation and security was to be accomplished by *requiring* one. We submit that if Congress desired certainty in order to justify the waiving of security, then it might as well make the payment conclusive, as we contend that it did, for the delay would be incurred in any event. Moreover, the court was under a misapprehension in assuming that a definite ascertainment would have involved delay. As we have pointed out above, the Congressional Record shows that while Congress was considering the bill, it had been advised that the Commission was already prepared to make definite ascertainments without any substantial delay.

The District Court of Minnesota and the Circuit Court of Appeals of the Eighth Circuit are the only courts which have passed upon this question with full consideration and full knowledge of the legislative history, and with full knowledge

of the facts disclosed by the Congressional Record. We submit that the decision of the Court of Appeals of the District in the *Northern Pacific case,* involving different facts, and being in the nature of a *dictum,* and made without knowledge of the facts disclosed by the Congressional Record, is not really in conflict with the decisions in the present case.

It must be noted that this decision stands upon the authority of the District Court of Appeals alone. While a writ of certiorari was refused by the Supreme Court of the United States in a memorandum decision, without any opinion, in 275 U. S. 572, the decision derives no support whatever from that fact. In *United States v. Carver,* 260 U. S. 482 at 490, the Supreme Court says, "the denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times".

In view of the foregoing, it appears clearly that it was not intended that a partial certificate under Section 212 should yield to a final certificate for a smaller amount under Section 209(g), without other proof of mistake or fraud in the partial certificate, and that the mere making of a final certificate for a smaller amount does not in itself prove an "overpayment" or create a cause of action for the difference. There is no claim of fraud in this case and it remains to consider whether the evidence conclusively shows mistake, or failure on the part of the Commission to comply with the requirements of the statute in making its partial certificate.

III. *It is not shown conclusively or at all that the Commission issued its partial payment certificate of March 1, 1921, either through mistake or without authority of law.*

(a) *The findings of the lower court have the binding effect of a jury verdict and should not be set aside if supported by competent evidence.*

At the close of the hearing, both parties moved the court for judgment in favor of the respective parties on the sole ground that the record would support no other disposition of the case (R. 21). The court denied the Government's motion and found in favor of the defendant and its finding is equivalent, therefore, to the finding of a jury. *Campbell v. Willis,* 53 App. D. C. 296—citing: *Beuttell v. Magone,* 157 U. S. 154.

In such case the appellate court will not reverse for error of fact, such as a finding contrary to the weight of evidence, but will determine whether the record contains substantial and sufficient evidence to support the finding and judgment. *Glaria v. Wash. So. Ry.,* 30 App. D. C. 559; *B. & O. R. R. Co. v. Miller,* 37 App. D. C. 218; *Federal Intermediate Credit Bank v. L'Herisson* (C. C. A. 8), 33 Fed. (2d) 841, and cases cited in notes; *Vicksburg, Shreveport & Pacific Ry. Co. v. Anderson-Tully Co.,* 256 U. S. 408; *United States v. U. S. Fidelity Co.,* 236 U. S. 512, 527; *Dooley v. Pease,* 180 U. S. 126; *Runkle v. Burnham,* 153 U. S. 216, 225; *Lehnen v. Dickson,* 148 U. S. 71; *Case Mfg. Co. v. Sorman,* 138 U. S. 431, 438; *Hathaway v. Cambridge Nat'l. Bank,* 134 U. S. 494; *Allen v. St. Louis Bank,* 120 U. S. 20, 30.

A reviewing court cannot invade the province of the jury (in this case a judge sitting as a jury) by determining questions of credibility and weight of evidence and then drawing the

conclusion from the residuum of evidence that there is no evidence. *Goldman v. U. S.*, 245 U. S. 474.

(b) *The certificate is lawful in form.*

There is no contention but that the partial certificate was properly signed and in proper form nor that the Commission took the required formal action. It was passed by the Comptroller and cashed by the Secretary of the Treasury without any question. The statute authorized the Commission to act, and upon the face of the record, the Commission did act in full compliance with the statute. The two lower courts have found that there was full compliance with the statute in every respect.

(c) *There is no claim of mistake or error in any item.*

There was no mistake on the part of the Commission in issuing the partial certificate unless it was the mere fact that it acted under the supposition that it would continue to use the same method of computation and that its final certificate would be for a larger amount. To assert that such a mistake as this will invalidate the certificate is to assert that refund must necessarily be allowed if methods are changed or if the final certificate is smaller, no matter how clearly Congress may have expressly declared that refund should not be allowed on this ground alone. Such certificates are necessarily subject to attack for mistake, and if this is a mistake, it means that the partial certificate under Section 212 could not be made binding no matter how clearly Congress might declare that it should be. Certainly it cannot be claimed that the members of the Commission acted under a "mistake" of fact in 1921, merely because they did not then know that they or their successors would subsequently change their opinions or their working methods.

If there was any ignorance in this situation, it was a conscious ignorance. In the nature of things, the Commission on March 1, 1921, could not then know what conclusions it or its successors might draw later on from facts already known. The Commission knew that it was ignorant of the future and Congress knew it; and yet the Commission was required to act and did act in spite of such conscious ignorance. There is no decision under the law of mistake which holds that any such conscious ignorance as this will vitiate any action.

In *United States v. Barlow*, 132 U. S. 271 at 280, the court said:

> "If an allowance is founded upon a clear mistake of fact *not a mere error of judgment*, and payments are in consequence made, the statute provides that 'the postmaster general shall cause suit to be brought to recover such wrong or fraudulent payment of excess with interest', which means that if such mistake be established in the action of the department, a recovery must follow.
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> * * * * *
>
> It is also true that where the subjects in relation to which the contract of parties is made, are necessarily of an uncertain and speculative character or value, and that is known to the parties, a mere mistake by them in their estimate of the value is not deemed sufficient to authorize a recovery of the monies paid upon the erroneous estimate. If this were a case of that description no recovery could be had." (Italics ours.)

(d) *There was no lack of compliance with the statute.*

The plaintiff contends that the Commission failed to make a "definite ascertainment" as required by the statute. Its evidence and arguments on this point are so interwoven as to be somewhat confusing and can perhaps be clarified by segregat-

ing them under the following headings. Page references are to Petitioner's Brief.

(1) Evidence as to the amount or thoroughness of the Commission's work.

(a) The witness' adjectives, such as cursory, perfunctory, mere estimate, etc., pp. 25, 26, 27.

(b) Statements that the work was not different in character and amount from investigation made for advances under Section 209(h), p. 26.

(2) Evidence going to the intent, purpose or state of mind of the Commission.

(a) That the investigation was not regarded as definite and had no intent of finality, p. 27.

(b) Regarded as similar to investigation for advances under Section 209(h), p. 26.

(c) That the work was performed before Section 212 was passed and before a definite ascertainment was required and was done for other purposes, pp. 28, 30.

(d) That no further work was done after Section 212 was passed, pp. 28, 29.

(3) Evidence that no definite ascertainment was possible.

(a) Because of incomplete information and data, pp. 26, 27.

(b) Because underlying principles unsettled, pp. 29, 30.

(c) Because no agreement made under Section 212(b) as to the net effect of deferred debits and credits, p. 29.

We shall discuss the above contentions in turn.

(a-1) *As to the sufficiency and thoroughness of the Commission's work.*

Opposed to the statements of the plaintiff's witness that the work was cursory and perfunctory and not different in amount or character from investigation for advances under Section 209(h), we have the undisputed facts that the Commission had been engaged in a study of methods and formulae for a year with as many as 40 men employed exclusively on this work (R. 55, 62); that it had had the advantage of two or three years previous study on the same subjects by the Director General and his organization (R. 63); that it had issued three general orders with elaborate forms, instructing the carriers as to the methods of preparing and submitting data (R. 143, 174, 176); that it had 119 pages of such data submitted by the defendant (R. 57); that a force of the Commission's engineers and accountants had paired with representatives of the carrier and had worked all day every day for a week or more in computing the carrier's allowance (R. 59, 60); that a thorough mathematical check of the figures was made (R. 98); that claims for increase in prices were thoroughly checked and corrected (R. 98, 99); that Section 209 specified the methods which the Commission was to follow in making these allowances and the Commission attempted to comply with all these requirements as far as the amount of information and time available would permit (R. 62); that wherever the defendant had followed a method or principle which the Commission considered questionable, a deduction was made to cover it so that only items which were definitely approved were allowed to stand (R. 69). An elaborate four page report showing the result of the Bureau's computations and the deductions which were made with reasons for the same was submitted to the Commission (Ex. C, R. 214-219). The amount of work and the

methods that were followed were the same as in the case of the *final* settlement with the Norfolk Southern a month previous (R. 96-106, 108, 114-116). The investigation was far more thorough than investigations under Section 209(h) because the data consisted of 119 pages instead of only 20 and contained all of the information necessary for a *final* settlement as required by the Commission's general order of October 18, 1920 (R. 57, 58, 143, 190).

In order to test the effect of this evidence as to the amount and character of the Commission's work, apart from any question of *intent*, let us assume that such evidence were offered in an attack upon a final certificate issued under Section 209(g), or an attack on a partial certificate under Section 212, issued long after the statute was enacted and when the Commission's intention to make a definite ascertainment was not in question. Certainly in such a case, testimony of an employe that the work was cursory and perfunctory would have no weight and the case would be dismissed for lack of evidence if no other testimony were offered. The Commission's recital in its own certificate that it had made a definite ascertainment and that the amount could not be reduced by further accounting or otherwise, aided by the presumption that the Commission had done its duty, and supported by evidence such as that outlined above and by the findings of two lower courts, would leave no room for debate. We conclude that the evidence of hasty and insufficient work by the Commission must be disregarded. For the purpose of the next two subdivisions of this argument, and under the lower court's findings, the case must stand, so far as the amount and character of labor expended by the Commission is concerned, exactly as though the certificate were the result of months of the most meticulous and painstaking computations.

(a-2) *As to the intent and purpose with which the work was done.*

Under this heading the plaintiff's witness testified that the Commission's determination was not regarded as definite and had "no intent of finality", but that the intent was to make a mere estimate similar to what had been made for advances under Section 209(h). The witness does not purport to know what was in the minds of the members of the Commission or of his superior officers in the Bureau. He does not purport to have heard any expression from them nor does he show any other foundation for his opinion as to their state of mind.

Opposed to this we have the letter from Chairman Clark of the Commission to the Chairman of the Congressional Committee on January 22nd, more than a month before our certificate was issued, clearly calling attention to the fact that the amounts are to be "definitely ascertained" and that "there is no room for misunderstanding" as to this. We have instructions issued on March 2nd, the day after our certificate, and presumably duly considered long before, stating that "partial payments are not based upon estimates as were advances under Section 209(h) but represent definite ascertainments. * * * Partial payments, being based upon definite determinations and not upon estimates, must be based upon the same character of adjustments as final payments are based upon * * *" (R. 218). And finally we have the declaration of the Commission itself, "In the Matter of Final Settlement under Section 209 of the Transportation Act 1920", 70 I. C. C. 711 at 714 that "We are required to make a definite ascertainment for partial payment purposes as clearly as we are required to make definite ascertainments in final settlements".

The Government relies upon the fact that when the work was being done, Section 212 had not yet been enacted, that there was, therefore, no statutory requirement of a "definite ascertainment" at that time, and that the work was done and determination made for an entirely different purpose and not with the intent of making a definite ascertainment under Section 212, since Section 212 did not exist. There are two answers to this. First, while Section 212 had not yet been enacted, its passage had previously been recommended by the Commission, and its early enactment must have been anticipated. Second, the report made by the Bureau prior to the passage of Section 212 (Ex. B, R. 210-213) and the so-called certificate for credit purposes issued by the Commission on February 23, 1921 (Ex. 1, R. 133) both indicate that they were issued under Section 209(g), and Section 209(g) specifically required a definite ascertainment and not an estimate.

So far as the question of intent or purpose is concerned, therefore, there is ample evidence to support the findings of the lower courts that the Commission intended to make a definite ascertainment.

In order to test the effect of the Government's argument that no further determination was made by the Commission after Section 212 was passed, and that the determination previously made was made for another purpose, let us assume that the Commission had spent months of the most meticulous labor on this one case and had figured to a penny, with the utmost definiteness and certainty, the amount believed to be due—but that all this had been done before the enactment of Section 212, and for the purpose of an advance or a credit certificate or for some purpose other than a "definite ascertainment" under Section 212. Suppose that Section 212 were then enacted, requiring, for the first time in specific statutory terms, a "definite

ascertainment" as a basis for a partial certificate. Could the Commission then adopt its previous computations and its previous determination as a "definite ascertainment" under the new statute? Or would the fact that that previous determination had been made with another purpose in mind destroy its value entirely, and require that it be scrapped and that the same identical calculations be repeated and duplicated over another period of months in exactly the same way in all respects, except with a different purpose in mind? To ask the question in this way is to answer it. If the Commission, in doing its previous work, had regarded it as accurate and certain, the fact that it was originally done for some other purpose would clearly be immaterial. Upon the enactment of the new statute, the Commission would find itself already sufficiently informed and with sufficient data and computations at hand to make at once a "definite ascertainment" under the terms of the statute. The fact that the information might have been obtained and the computations made for a different purpose would be immaterial. We would have to regard the case exactly as though the same amount of investigation had been made *after* the enactment of the statute.

It is true that in this case the Commission's previous investigation of Great Northern records had covered only days and not months, but since the lower court has found that there was no non-compliance with the statute so far as quantity of work is concerned, the effect is the same. There are no degrees of compliance with the statute. Therefore, when the Commission issued its certificate of March 1st, adopting its previous determination as a definite ascertainment under Section 212, the purpose for which the original determination was made becomes entirely immaterial. So far as the accuracy of that prior work is concerned, it would stultify both the Bureau

and the Commission to assume that they were deliberately less careful or less accurate because the certificate was to be used in obtaining money from the banks instead of from the Government.

(a-3) *As to the alleged impossibility of making a definite ascertainment because of insufficient data or unsettled principles.*

In support of its contention that there was insufficient data, the Government argues on pages 26 and 27 of its brief that our books had not been closed, that there were still numerous outstanding accounts subject to adjustment, and that the data submitted with the claim was frequently revised and augmented later. It is true that there were reserve accounts and unaudited items upon our books, covering such matters as unsettled damage claims, uncollected revenues and the like, but at the time the partial payment was made, such items then remaining on our books amounted to only $200,000 (R. 66). After determining that $15,705,688 would be due us, the Commission made an arbitrary deduction of more than three million dollars before issuing its certificate for $12,500,000. This was far more than sufficient to cover all unaudited items.

Moreover the accounting rules of the Commission permit and require such reserve accounts and all railway companies must have them (R. 64). There were similar unadjusted accounts upon the books of the Norfolk Southern when it received its final certificate under Section 209(g) (R. 115), and upon the books of the Great Northern when our final certificate was issued in July, 1926 (R. 66). Moreover, in enacting Section 212(b), Congress expressly recognized the fact that there must be deferred debit and credit items upon the books of the carrier and expressly provided that this situation should not be a

bar to payment but that such items might be covered by an estimate.

As to the testimony that the data submitted with our claim was frequently revised and augmented later, it appears that the only revisions which were made were, first, in statements covering items previously in reserve accounts, and, second, in additional data furnished by the carrier at the request of the Commission (R. 108). The carrier never voluntarily amended its claim and no errors were ever developed in the data originally furnished to the Commission (R. 109).

It is true that the Commission had not sent its accountants into our general offices to check our books, but nothing of the sort was required under the law, and neither was this done prior to the *final* settlement with the Norfolk Southern Railway (R. 115). When the Commission finally checked our books in 1923, the total exceptions amounted to only $351,492.35 or only a little more than 10% of the arbitrary deduction which had been made by the Commission (R. 53, 54). There is no evidence that these exceptions taken by the Commission were correct, or that there was in fact any error in any amount whatever upon our books.

That the Commission considered itself in a position to make a definite ascertainment without any check of our books, and in spite of the unaudited items, is evidenced by the fact that it offered to give us a certificate for final settlement in place of our certificate for partial payment, if we would waive certain unsettled questions (R. 108).

On pages 29 and 30 of its brief, the Government argues that a definite ascertainment was impossible because the Commission itself had not determined upon many of accounting and other principles to be followed in making its final ascertainment. In support of this it cites two general decisions of the

Commission made later, establishing certain methods and principles.

The statute did not require the Commission to make a general announcement of all or any of its methods and principles before making definite ascertainments in individual cases. It had made final settlement with at least four carriers before any of the general decisions cited by the Government were issued. 65 I. C. C. 798; 67 I. C. C. 713, 726, 729. It had made final settlements with more than 100 carriers before August 15, 1923, the date of the last of these general decisions in 82 I. C. C. 678. (36th Annual Report of the Interstate Commerce Commission, 1922, pages 223- 226, inclusive). It had offered the Great Northern a certificate of final settlement at the time when the partial certificate was issued (R. 108).

In *Maintenance Expenses under Section 209*, 70 I. C. C. 115 at 127, decided July 12, 1921, the Commission issued a general decision upon the two major questions then before it, denying any allowance for so-called ineffectiveness of labor and refusing to increase depreciation charges because of increase in prices. In this decision, the Commission said, "This report deals with the two major questions which have been in dispute and which were argued before the full Commission last December. Minor questions are appropriately left to be determined as they arise in specific cases". In other words, the Commission itself recognized that it could decide questions of principle in specific cases as well as by general decisions.

The Commission had been engaged in a study of methods and principles for more than a year before the date of our partial certificate and had had as many as 40 men employed in this work (R. 55, 62). It had had the benefit of two or three years previous study of the same subject by the Director General (R. 63). Clearly, it considered itself to be and it was in a

position to determine what methods and principles should be followed, and to make definite ascertainments, without making any previous general decisions announcing its methods.

When it examined our claim, it was fully advised as to the methods and principles which had been followed in computing it. Items were rejected not only when the methods which had been followed were disapproved, but even where they were in question and had not been definitely approved. Everything that had not been approved and that was in question was disallowed (R. 69). Clearly, this amounted to the adoption in our case of definite methods and principles, even though there had been no previous announcement of them.

It is not shown that either of the two later general decisions cited on pages 29 and 30 of the Government's brief changed in any way the methods which were followed in making our partial certificate. There is not one word of evidence anywhere in the record that any rule, method or principle promulgated in either of these decisions was in any way different from the rules, methods and principles followed in our determination. Our claims for ineffectiveness of labor and for increase of depreciation charges were rejected in computing the amount of our partial certificate, and this was in accordance with the Commission's later decisions (R. 67).

The only later general decision which is shown to have promulgated any different methods or principles was the decision of December 15, 1921, "In the Matter of Final Settlement under Section 209 of the Transportation Act, 1920", 70 I. C. C. 711, which is not cited by the Government. This was the decision by which the Commission abandoned the method of determining precise increases for each group of expenses, and substituted the method of applying general territorial averages to the expense as a whole, in determining increases

in the cost of labor and materials. As to this there was no unsettled question before the Commission when our partial certificate was made, as at that time no one had suggested the use of a general or territorial average, and the propriety of applying precise increases to separate groups of expenses had never been questioned (R. 98). Other similar changes in method were in fact used later but were not announced in any general decisions, and there is no evidence that any of them were considered unsettled or under consideration at the time of our partial certificate.

The entire evidence on this phase of the case shows nothing more than the mere fact that as the work of the Commission proceeded, it abandoned more and more the method of precise calculation and adopted more and more the use of "judgment factors" and general averages, and occasionally made general announcement of *some* of its methods. There is not one word of evidence in the record that the original determination in our case included any inaccuracy or error, that any item was erroneously included or computed, or that the methods later used were more accurate, or that any methods or principles used in computing our partial certificate were unsettled or in question at the time. On the contrary, every item that involved any method or principle then in question was rejected (R. 79). The fact that the methods used later produced a result three and a half million dollars less than the method by precise calculation, and five million dollars less than our actual expenditures suggests that the methods later used were ridiculously inadequate.

On page 29 of its brief, petitioner asserts that the Commission failed to eliminate deferred items from our claim or to reach an agreement with the carrier as to the net effect of deferred items, and that this was in violation of Section 212(b)

and so invalidated the certificate. But at the time of our certificate, the deferred items remaining on our books amounted to only $200,000 (R. 66). The Commission arbitrarily deducted $3,205,688 from our total claim before making its certificate (R. 215). Section 212(b) imposed no *obligation* upon the Commission to allow anything at all for deferred items or to enter into any agreement regarding them. It merely "authorized" the Commission to do so "whenever in its judgment practicable". As long as a deduction was made, far in excess of the amount of the deferred items, before certifying the balance, there can be no complaint upon this ground.

We conclude that there was no impossibility of making a definite ascertainment but that the Commission could and did make final settlements as well as partial payments at that time; that its computation was sufficiently thorough and accurate for a definite ascertainment; and that there is ample evidence of the intent and purpose of the Commission to make a definite ascertainment. Its first certificate for "credit" purposes purported to be made under Section 209(g) which required a definite ascertainment, and when the second certificate was issued on March 1, 1921, the Commission specifically adopted its previous computations as a definite ascertainment under Section 212.

In its opinion below, the Court of Appeals said (R. 237, 238):

> "We think that, under the authority lodged in it by the act of February 26, 1921, the Interstate Commerce Commission, at the time the partial certificate in controversy was issued, had full power, in its discretion, to adopt and act upon the information and data before it respecting computations to be made in arriving at the definite ascertainment required by the law and that it did so. The record discloses no mistake either of fact or law, nor that the commission exceeded its authority under the remedial

statute. It took affirmative action within the scope of its authority, with no misconception or misconstruction of the terms of that statute, and with full knowledge of the existing facts essential to the determination it was called upon to make. No fraud or collusion is, or could be, claimed. Its conclusion, as evidenced by its certificate of March 1, 1921, is deemed to be conclusive.

* * * * *

Because of the importance of the issues involved, we have carried this discussion beyond the limits required for a determination of whether the record discloses subsantial evidence sufficient to support the finding and judgment of the trial court. Our conclusion is that not only is the judgment supported by substantial evidence, but that, upon the whole record, that judgment should be affirmed. It is so ordered."

CONCLUSION.

If the Commission had adopted the practice of determining the amounts of its *final* certificates by first employing accountants and engineers to compute the allowance by a complete mathematical check, eliminating every doubtful item, and then, to make certainty doubly certain, had made a large arbitrary deduction of 20% before "definitely ascertaining" the balance, there could be no contention that they had thereby abused the discretion reposed in them. This process would be regarded only as an excess of caution and certainty. None of the grounds of attack which we face here would be seriously presented against such a *final* certificate. And yet if we are sound in Part II of this brief in arguing that the certificate under Section 212 was to be as definite and conclusive *pro tanto* as certificates under Section 209(g), these same grounds of attack should be given no more consideration here, especially after

two lower courts have passed upon them adversely. We respectfully ask that the judgment be affirmed.

Respectfully submitted,

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September 30, 1932.

APPENDIX.

Section 209 of the Transportation Act, 1920, c. 91, 41 Stat. 464, 465, 466 (U. S. C., Title 49, sec. 77), provides, in part:

SEC. 209(a). When used in this section—

The term "carrier" means (1) a carrier by railroad or partly by railroad and partly by water, whose railroad or system of transportation is under Federal control at the time Federal control terminates, or which has heretofore engaged as a common carrier in general transportation and competed for traffic, or connected, with a railroad at any time under Federal control; * * *.

The term "guaranty period" means the six months beginning March 1, 1920.

The term "test period" means the three years ending June 30, 1917; * * *.

(b) This section shall not be applicable to any carrier which does not on or before March 15, 1920, file with the Commission a written statement that it accepts all the provisions of this section.

(c) The United States hereby guarantees—

(1) With respect to any carrier with which a contract (exclusive of so-called co-operative contracts or waivers) has been made fixing the amount of just compensation under the Federal Control Act, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one-half the amount named in such contract as annual compensation, * * *.

* * * * *

(f) In computing railway operating income, or any deficit therein, for the guaranty period for the purposes of this section—

* * * * *

(3) There shall not be included in operating expenses, for maintenance of way and structures, or for maintenance

of equipment, more than an amount fixed by the Commission. In fixing such amount the Commission shall so far as practicable apply the rule set forth in the proviso in paragraph (a) of section 5 of the "standard contract" between the United States and the carriers (whether or not such contract has been entered into with the carrier whose railway operating income is being computed);

* * * * *

(5) The Commission shall require the elimination and restatement of the operating expenses and revenues (other than for maintenance of way and structures, or maintenance of equipment) for the guaranty period, to the extent necessary to correct and exclude any disproportionate or unreasonable charge to such expenses or revenues for such period, or any charge to such expenses or revenues for such period which under a proper system of accounting is attributable to another period.

(g) The Commission shall, as soon as practicable after the expiration of the guaranty period, ascertain and certify to the Secretary of the Treasury the several amounts necessary to make good the foregoing guaranty to each carrier. The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States, for the amount shown in such certificate as necessary to make good such guaranty. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated.

(h) Upon application of any carrier to the Commission, asking that during the guaranty period there may be advanced to it from time to time such sums, not in excess of the estimated amount necessary to make good the guaranty, as are necessary to enable it to meet its fixed charges and operating expenses, the Commission may certify to the Secretary of the Treasury the amount of, and times at which, such advances, if any, shall be made. The Secretary of the Treasury, on receipt of such certificate, is au-

thorized and directed to make the advances in the amounts and at the times specified in the certificate, upon the execution by the carrier of a contract, secured in such manner as the Secretary may determine, that upon final determination of the amount of the guaranty provided for by this section such carrier will repay to the United States any amounts which it has received from such advances in excess of the guaranty, with interest at the rate of 6 per centum per annum from the time such excess was paid. There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, a sum sufficient to enable the Secretary of the Treasury to make the advances referred to in this subdivision.

* * * * *

The Act of February 26, 1921, c. 72, 41 Stat. 1145 (U. S. C., Title 49, sec. 79), provides:

That the Transportation Act, 1920, is hereby amended by adding after section 211 a new section to read as follows:

"SEC. 212. (a) In making certifications under section 204 or section 209, the Commission, if not at the time able finally to determine the whole amount due under such section to a carrier or the American Railway Express Company, may make its certificate for any amount definitely ascertained by it to be due, and may thereafter in the same manner make further certificates, until the whole amount due has been certified. The authority of and direction to the Secretary of the Treasury under such sections to draw warrants is hereby made applicable to each such certificate. Warrants drawn pursuant to this section, whether in partial payment or in final payment, shall be paid: (1) If for a payment in respect to reimbursement of a carrier for a deficit during the period of Federal control, out of the appropriation made by section 204; (2) if for a payment in respect to the guaranty to a carrier other than the

American Railway Express Company, out of the appropriation made by subdivision (g) of section 209; and (3) if for a payment in respect to the guaranty to the American Railway Express Company, out of the appropriation made by the fifth paragraph of subdivision (i) of section 209.

"(b) In ascertaining the several amounts payable under either of such sections, the Commission is authorized, in the case of deferred debits and credits which can not at the time be definitely determined, to make, whenever in its judgment practicable, a reasonable estimate of the net effect of any such items, and, when agreed to by the carrier or express company, to use such estimate as a definitely ascertained amount in certifying amounts payable under either of such sections, and such estimates so agreed to shall be prima facie but not conclusive evidence of their correctness in amount in final settlement.

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p 6.

SUPREME COURT OF THE UNITED STATES.

No. 96.—October Term, 1932.

The United States of America, Petitioner, *vs.* Great Northern Railway Company, Respondent.	On Writ of Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

[November 7, 1932.]

Mr. Justice Cardozo delivered the opinion of the Court.

The petitioner, the United States of America, has sued to recover a payment made to the respondent, the Great Northern Railway Company, by force of a certificate of the Interstate Commerce Commission, the government asserting that the payment was excessive and that the certificate permitting it was the product of mistake. A judgment of the District Court in favor of the respondent was affirmed by the Circuit Court of Appeals for the Eighth Circuit. 57 F. (2d) 385. The case is here on certiorari.

The respondent was a railroad under federal control when control was relinquished by the government on March 1, 1920. By the Transportation Act of that year (41 Stat. 464, § 209; 49 U. S. C., § 77), it had the protection of a guaranty as to its railway operating income for six months thereafter. The United States guaranteed that during this guaranty period the income should be not less than one-half of the annual compensation to which the carrier was entitled during the period of federal control. *United States* v. *Guaranty Trust Co.*, 280 U. S. 478; *Texas & Pacific Ry. Co.* v. *United States*, 286 U. S. 285; *Continental Tie and Lumber Co.* v. *United States*, 286 U. S. 290. Upon the Interstate Commerce Commission was laid the duty of ascertaining the amounts necessary to make good this guaranty and of certifying to the Secretary of the Treasury the results of the inquiry. Something more was required for this purpose than the mere comparison of receipts and expenses during the period of control with receipts and expenses during the six months following. In the ascertainment of railway operating income, or any deficit therein, the amount to be included in operating expenses for maintenance of way and structures, or for maintenance of equipment, was to be

fixed by the Commission, and was not dependent solely on the action of the carrier. For that purpose reference was to be had to the tests prescribed by the standard form of contract for federal control. Transportation Act, 1920, § 209f (3); Federal Control Contract, § 5a. The Commission was to take as its base the average six months' maintenance expenses of the carrier during the years characterized as "the test period", i. e., the three years ending June 30, 1917. This amount was to be readjusted, however, so as to make allowance for changes in the extent of property maintained, for changes in the nature or intensity of the use, and, most important, for changes in the cost of labor and material. The end in view was the arrival at a figure that would permit the property to be kept up in the same state of reparation as at the time when the carrier's possession had been yielded to the government. The task of the Commission was not exhausted, however, when it ascertained the allowance to be made for the cost of maintenance. It was to require the restatement of other operating expenses in addition to those for maintenance "to the extent necessary to correct and exclude any disproportionate or unreasonable charge to such expenses" for the guaranty period, or any charge "which under a proper system of accounting is attributable to another period." Transportation Act, § 209f (5).

A task so vast and intricate exacted time and study. Many of the carriers, however, including this respondent, were in urgent need of cash for pressing obligations. The statute contained provisions that were intended to relieve the pressure. By § 209 (h) the Commission was empowered, upon application during the guaranty period, to issue certificates for advance payments, such advances to be not in excess of the "estimated amount" necessary to make good the guaranty. The Secretary of the Treasury was directed to make the advances in the amounts specified in the certificate upon the execution by the carrier of a contract, "secured in such manner as the Secretary may determine," that upon final determination of the amount of the guaranty it would repay the excess payment with interest, if excess there should be found to be. Under the authority of that section, certificates in the amount of $6,500,000 were issued by the Commission and collected by the carrier. The payments thus received were well within the limit of the guaranty as finally determined and as to these no claim for reimbursement is put forward by the government.

The relief permissible under § 209 (h) turned out to be inadequate. It was limited to applications made before the guaranty period had expired, to applications, that is to say, before September 1, 1920. In the case of the respondent, as in that of other carriers, the guaranty period expired with the Commission still unready to announce its ultimate award, and with the pressure of the need for intermediate relief as urgent as before. Accordingly, the Transportation Act, 1920, was amended on February 26, 1921, by authorizing the Commission, if not at the time able finally to determine the whole amount due, to make its certificate for any amount definitely ascertained by it to be due, and thereafter in the same manner to make further certificates, until the whole amount due had been certified. Act of February 26, 1921, c. 72; 41 Stat. 1145, § 212; 49 U. S. C., § 79. The text of the statute is quoted in the margin.*

At the time of the enactment of that section, the respondent had already filed with the Commission a guaranty claim in the

*"Sec. 212. (2) In making certifications under section 204 or section 209, the Commission, if not at the time able finally to determine the whole amount due under such section to a carrier or the American Railway Express Company, may make its certificate for any amount definitely ascertained by it to be due, and may thereafter in the same manner make further certificates, until the whole amount due has been certified. The authority of and direction to the Secretary of the Treasury under such sections to draw warrants is hereby made applicable to each such certificate. Warrants drawn pursuant to this section, whether in partial payment or in final payment, shall be paid: (1) If for a payment in respect to reimbursement of a carrier for a deficit during the period of Federal control, out of the appropriation made by section 204; (2) if for a payment in respect to the guaranty to a carrier other than the American Railway Express Company, out of the appropriation made by subdivision (g) of section 209; and (3) if for a payment in respect to the guaranty to the American Railway Express Company, out of the appropriation made by the fifth paragraph of subdivision (i) of section 209.

"(b) In ascertaining the several amounts payable under either of such sections, the Commission is authorized, in the case of deferred debits and credits which can not at the time be definitely determined, to make, whenever in its judgment practicable, a reasonable estimate of the net effect of any such items, and, when agreed to by the carrier or express company, to use such estimate as a definitely ascertained amount in certifying amounts payable under either of such sections, and such estimates so agreed to shall be prima facie but not conclusive evidence of their correctness in amount in final settlement."

sum of $18,498,391.67, of which $6,500,000 had already been paid through certificates issued under § 209 (h), leaving a balance of $11,998,391.67 still claimed to be due. The respondent, in submitting this claim, gave notice that it required a $6,000,000 advance to meet a pressing obligation, and asked for a certificate to that extent to be used as a basis for credit upon an application for a bank loan. Such a certificate was issued on February 23, 1921, though the Commission and the carrier understood that under the statute then in force it could not be made the basis for a payment by the Secretary of the Treasury. Three days later section 212 was added to the Transportation Act, and the legal aspect of the situation was at once transformed. At the respondent's request, the Commission cancelled its advisory certificate of February 23, 1921, and on March 1, 1921, issued a new certificate under the authority of the statute. "The Commission has ascertained and hereby certifies to the Secretary of the Treasury that the amount of six million dollars ($6,000,000) in addition to any sum or sums heretofore certified in favor of the carrier under section 209 of the Transportation Act, 1920, is necessary to make good to said carrier the guaranty provided by the said section. The Commission hereby certifies that such amount of six million dollars ($6,000,000) cannot be reduced by further accounting or otherwise," with which was coupled a statement that additional amounts might be found to be owing on further investigation.

The respondent, armed with this certificate, procured from the Treasury the $6,000,000 required for its present needs. This amount added to the earlier payments of $6,500,000, makes up a total of $12,500,000 collected on account of its claim against the government. The total was nearly $6,000,000 less than the amount claimed by the respondent to be ultimately due. It was about $3,200,000 less than the estimate of the final payment submitted as a basis for the certificate in a report to the Commission by the Bureau of Finance. Whatever the final payment might afterwards be found to be, the sum certified to be due left or seemed to leave a margin of error ample enough for any change within the zone of reasonable expectation.

The Commission, after satisfying thus the instant needs of the respondent, continued the investigations necessary to ascertain the final balance. Not till five years had passed was it ready to announce its findings. In the meantime it had filed a series of reports or decisions defining or revising the principles and for-

mulae that were to govern it thereafter in the allowance or disallowance of expenditures for maintenance. See, e. g., Maintenance Expenses under § 209, 70 I. C. C. 115; In the matter of Final Settlement under § 209 of the Transportation Act, 1920, 70 I. C. C. 711. By its final certificate issued on June 8, 1926, under § 209 (g), it certified that the total amount necessary to make good the guaranty was $11,170,214.02, which was less by $1,329,786.98 than the payments already made. Cf. *Great Northern Railway* v. *United States,* 277 U. S. 172. For the recovery of the difference with interest this action was brought.

We may assume in favor of the petitioner that a certificate issued by the Commission under § 212 of the statute is open to impeachment for fraud or mistake, and that payments burdened with those infirmities are subject to be reclaimed. If this be assumed, it does not avail without more to lay a duty of restitution upon the carrier before us. Fraud in the making of the certificate is neither proved nor even intimated. Mistake also there was none, but merely a revision of judgment in respect of matters of opinion. The respondent reported that it had paid out for maintenance during the guaranty period $28,982,000. There is no claim that this report was false even to a penny. Readjustments were needed, however, as we have already pointed out, whereby allowance might be made for fluctuations in the cost of labor and material, as well as for other economic changes, between the period of test and the period of guaranty. The formulae for the readjustment of maintenance expenditures in use by the Commission on March 1, 1921, reduced the maintenance allowance to $27,233,000, which was more than one and a half million dollars less than the expenditures actually made. The formulae in use on June 8, 1926, reduced the allowance for maintenance to $23,815,000. In this last reduction lies the explanation of the discrepancy between the partial certificate and the final one. Neither set of formulae is an expression of mathematical truth in such a sense that accuracy may be affirmed of one and error of the other. Each makes it necessary to multiply the expenses of the test period by a factor derived from an imperfect and approximate estimate of a composite change of prices. To what extent the factor is an expression of mere opinion is perceived when the process back of it is considered. At the date of the partial certificate various items of expense during the years of the test period—the cost of locomotives, of cars, of tracks, and many others—were separately considered,

and the proper percentages of increase during the period of the guaranty applied separately to each of them. At the date of the final certificate, the Commission determined to abandon these refinements. It joined together all the property of all the carriers in regional or territorial groups, and ascertained the factor of increase for the members of a group collectively. By the use of this method, the test period expense was to be "multiplied by a factor representing the increase in the general level of cost of labor and material for the territories in which the lines of railroad of the carrier are situated." A general equation factor was substituted for a series of factors separately computed and separately applied. The result, as the Commission concedes in its report, is at best an approximation representing an exercise of judgment as to the effect of a composite increase. What is thus conceded in the report as to the source of the discrepancy between the two certificates was confirmed upon the trial by the testimony of a witness for the government. The difference, he tells us, "grew out of a difference of opinion as to the method of calculation rather than out of errors in the figures submitted." The Commission has not said that in any particular case the general equation factor will yield results more accurate than those attained by the method theretofore in use. It has claimed no more for the new method than an enhancement of simplicity along with an approach to accuracy not inferior to that of the method displaced.

In these circumstances we find no basis for a holding that the payment made to the respondent under the partial certificate of March 1, 1921, was due to any mistake of fact, either unilateral or mutual. *United States* v. *Barlow*, 132 U. S. 271, 280, 281. Cf. *Gordon* v. *Butler*, 105 U. S. 553, 557, 558. The officials of the government knew precisely what they were doing, and kept well within the statute defining their authority. They did not act illegally like the officials whose acts were challenged in the cases cited by the petitioner. *Wisconsin Central Railroad Co.* v. *United States*, 164 U. S. 190; *Grand Trunk Western Railway Co.* v. *United States*, 252 U. S. 112; *Burnet* v. *Porter*, 283 U. S. 230. Charged with a difficult task exacting judgment and discretion, they came to a decision in good faith with knowledge of the relevant facts and without departure from the law. If the payment under their certificate is to be reclaimed, some other ground than mistake or illegality must be found to sustain the reclamation.

Mistake and illegality being thus excluded from the reckoning, we are brought to a second ground for reclamation put forward by the government. The argument is made that by the true construction of the statute, a certificate issued by the Commission under § 212 is provisional and tentative; that upon the issuing of a final certificate of inconsistent tenor, it is superseded and nullified as to the past as well as to the future; and that payments made under its authority, though legal in the making, become illegal by retroaction. We do not so interpret the meaning of the statute. If all that the lawmakers had in view was to authorize mere advances on the basis of an estimate, the carrier remaining bound to refund the excess in the event that the estimate was thereafter found to be too high, a suitable form was at hand in § 209 (h) for the expression of their purpose. All that was necessary was to strike out the requirement that application must be made during the guaranty period, and to provide that the promise of the carrier to refund might be accepted without security. Section 209 (h), thus reframed, would have given expression with nicety to the obligation which the respondent is said to have assumed. But § 212, as enacted, was drafted upon different lines. By subdivision *a* of the section, the Commission, if unable finally to determine the whole amount due, may make its certificate for any amount definitely ascertained by it to be due, with supplemental certificates from time to time thereafter. No longer does the statute speak, as it had spoken in § 209 (h), of "estimated amounts," and of contracts to refund any excess in the "advances." The newly authorized certificates are to represent what has been "definitely ascertained"; and moneys procured thereby are characterized no longer as "advances," but as partial or final payments. If, however, the meaning of subdivision *a* could conceivably be doubtful when considered by itself, the doubt is removed by subdivision *b*. The lawmakers foresaw that there might be "deferred debits and credits," such as unsettled damage claims, which could not be fully ascertained till a long time had gone by. Accordingly, subdivision *b* provides that the Commission shall be "authorized, in the case of deferred debits and credits which cannot at the time be definitely determined, to make, whenever in its judgment practicable, a reasonable estimate of the net effect of any such items," the estimates so made to be "prima facie but not conclusive evidence of their correctness in the event of final settlement." The petitioners would have us hold that subdivisions *a* and *b*, parts

of a single section, mean one and the same thing with all their differences of form. The contrast between them is too pointed to permit us to find identity of thought lurking dormant and concealed beneath this diversity of phrase.

Thus far we have not traveled, in our search for the meaning of the lawmakers, beyond the borders of the statute. In aid of the process of construction we are at liberty, if the meaning be uncertain, to have recourse to the legislative history of the measure and the statements by those in charge of it during its consideration by the Congress. *United States* v. *Missouri Pacific Railroad Co.*, 278 U. S. 269, 278. If such recourse be had, there is confirmation of the view that the certificates were more than estimates of provisional advances. Subdivisions *a* and *b*, as originally introduced, drew no distinction as to the effect of payments made thereunder, the certificates being as conclusive under the one as under the other. A proposed amendment to modify subdivision *b* by making the effect of such certificates prima facie, but not conclusive, was carried. 60 Congressional Record, part 3, pages 2815, 2816. A separate proposed amendment to modify subdivision *a* in substantially the same way was rejected. 60 Congressional Record, part 3, pages 2812, 2815. In the discussion of these amendments, the inquiry was pressed whether the government would be helpless if the certificates were too high. The answer was emphatic that the certificates were final. 60 Congressional Record, part 3, pages 2739, 2802, 2803, 2809, 2812, 2813.

A word of answer is still due to the argument of the government that the certificate is void because the work of the Commission was so hasty and imperfect as to involve an abdication of its statutory duty. Without probing at this time the legal implications of this argument, we find it without adequate basis in the facts. Whatever basis it has is in the testimony of an accountant in the service of the Commission. His conclusions are contradicted by evidence, direct and circumstantial, offered by the carrier, and contradicted also by the recitals of his superior's certificate. The record may permit an inference that the whole amount owing in order to discharge the guaranty had not been so definitely determined as to make the Commission willing to recommend a settlement in full, though even this may be uncertain. It does not command a holding that the margin of error was so inscrutable as to preclude the definitive approval of a payment on account.

The judgment is affirmed.